LIBRARY
SUPREME COURT, U. S.

APPENDIX.

APR 9 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
31

PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO.

Filed January 8, 1969.

Probable Jurisdiction Noted February 24, 1969.

TABLE OF CONTENTS.

Relevant Docket Entries in Proceedings Below 1

Petition for a Writ of Mandamus in the Court of Common Pleas of Cuyahoga County (July 10, 1968) 2

Joint Answer of Respondents Cipollone, Carney, Duffy, Hughes and Stillman, in the Court of Common Pleas of Cuyahoga County (July 31, 1968) 9

Answer in the Court of Common Pleas of Cuyahoga County (July 31, 1968) 10

RELATOR'S BILL OF EXCEPTIONS IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

RELATOR'S EVIDENCE.

	Direct	Cross	Re-Direct
John H. Schimmels	---	13	---
Paul M. Brockington	19	21	23

Memorandum of Opinion (August 22, 1968) 25

Docket Entries in the Court of Appeals of Cuyahoga County 27

Journal Entry of the Court of Appeals 29

Docket Entries in the Supreme Court of Ohio 30

Journal Entries of the Supreme Court of Ohio 31

Case No. 863,239.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

April Term, 1968.

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,

Relator,

v.

JAMES A. RHODES, *et al.*,

Respondents.

RELEVANT DOCKET ENTRIES IN PROCEEDINGS BELOW.

Jul. 10, 1968 Petition, application for temporary restraining order, application for alternative writ of mandamus and precipe filed and:

To Court

Whereupon alternative writ of mandamus and summons issued to Sheriff of Franklin County for defendants James A. Rhodes, Ted W. Brown, William B. Saxbe, and alternative writ of mandamus and summons issued to Sheriff of Cuyahoga County for all other defendants.

Jul. 25, 1968 Demurrer of Respondents Carney, Duffy, Hughes, Stillman and Cipollone filed.

Jul. 29, 1968 Motion by Respondents Rhodes, Brown and Saxbe to quash filed.

Jul. 30, 1968 Relator's Brief in Opposition to demurrer of Respondents, Carney, Duffy, Hughes, Stillman and Cipollone.

Jul. 30, 1968 Relator's Brief in answer to motion to quash filed by Respondents Rhodes, Brown and Saxbe filed.

Jul. 30, 1968 To Court

Demurrer of Respondents Carney, Duffy, Hughes, Stillman and Cipollone overruled.

Motion to Quash of Respondents of Rhodes, Brown and Saxbe overruled.

Jul. 31, 1968 Answer of Respondents Carney, Duffy, Hughes, Stillman and Cipollone filed.

Aug. 1, 1968 Answer of Respondents Rhodes, Brown and Saxbe filed.

Aug. 6, 1968 Trial Brief of Relator filed.

To Court:

Heard and Submitted.

To Court:

Relators' Brief on merits filed. Respondents to file answer brief by or before August 13, 1968. Relator to file reply brief on or before August 15, 1968.

Aug. 12, 1968 Post trial brief of Respondents Carney, Duffy, Hughes, Stillman and Cipollone filed.

Aug. 13, 1968 Post trial brief of Respondents Rhodes, Brown, and Saxbe filed.

Aug. 15, 1968 Reply brief of Relator filed.

Aug. 22, 1968 Memorandum of opinion by Judge Jackson filed.

Aug. 27, 1968 Notice of Appeal filed.

PETITION FOR A WRIT OF MANDAMUS IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

(Filed July 10, 1968; title omitted in printing.)

1. For his cause of action relator Paul M. Brockington says that he is a citizen and elector of the State of Ohio; that he resides in the City of Cleveland within the Twenty-First Congressional District of Ohio; that he is more than 25 years of age and has been a citizen of the United States for more than seven (7) years. Relator is an independent candidate for the office of United States Representative from the Twenty-First Congressional District of Ohio in the November 5, 1968, general election.

2. Respondent James A. Rhodes, as are his successors in office, is sued in his representative capacity as the duly elected, qualified, and acting Governor of the State of Ohio with his office and official residence in Columbus, Ohio. The Governor of Ohio is charged with the general duty of enforcing the statutes of the State of Ohio and with particular responsibility under Section 3505.38 of the Ohio Revised Code for signing the certificate of election issued by the Secretary of the State of Ohio to those persons declared duly elected to the office of United States Representative.

3. Respondent Ted W. Brown, as are his successors in office, is sued in his representative capacity as the duly elected, qualified, and acting Secretary of State of Ohio with his office and official residence in Columbus, Ohio and his county office in Cleveland, Ohio at the Cuyahoga County Board of Elections. He is the chief election officer of Ohio under Section 3501.04, Ohio Revised Code. Section 3505.38 of the Ohio Revised Code requires him to issue certificates of election to those persons declared elected to office, including the office of United States Representative. The Secretary of State certifies the form of the ballots for general elections, together with the names of the candidates to be printed thereon, seventy five days before the elections are held. Section 3505.01 of the Ohio Revised Code.

4. Respondent William B. Saxbe, as are his successors in office, is sued in his representative capacity as the duly elected, qualified, and acting Attorney-General of the State of Ohio with his office and official residence in Columbus, Ohio. He is the chief law officer for the State of Ohio. Section 109.02 of the Ohio Revised Code. He has certain specific duties with respect to Ohio election procedure. Sections 3505.35, 3519.01, 3513.06, 3513.271, and 3515.13 of the Ohio Revised Code.

5. Respondent Joseph A. Cipollone, as are his successors in office, is sued individually and in his representative capacity as the duly appointed director of the Board of Elections of Cuyahoga County. Respondents Carney,

Duffy, Hughes and Stillman, as are their successors in office, are sued individually and in their representative capacity as members of the Cuyahoga County Board of Elections and as agents of the Secretary of State of Ohio, for the conduct of elections in Cuyahoga County. Independent candidates for the office of District Representative to Congress must file their nominating petitions with the various Boards of Elections. Section 3513.05 of the Ohio Revised Code. The Board of Elections determines the sufficiency of the signatures on the petition papers. Section 3513.262 of the Ohio Revised Code.

6. Candidates for party nomination to the office of United States Representative from Ohio Congressional Districts have their names printed on the ballot in primary elections of their party by filing with the Boards of Elections only 100 valid signatures. Section 3513.05 of the Ohio Revised Code. The names of those party candidates who win the primary elections are then placed on the ballot in the general elections.

7. Section 3513.257 of the Ohio Revised Code requires that independent candidates for the office of United States Representative file nominating petitions containing the valid signatures of qualified electors in a number equal to "not less than seven percent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district." Under prior Ohio statutes and until January 1, 1952, independent candidates for United States Representative could be nominated and placed on the ballot by obtaining signatures of one percent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district.

8. Relator says that he circulated and caused to be circulated on his behalf nominating petitions in order to place his name on the ballot in the November 5, 1968, general election as an independent candidate for the office of United States Representative from the Twenty-First Congressional District of Ohio.

9. Relator says that on or about February 19, 1968, within the time fixed by special statute, he filed nominating petitions bearing 899 valid signatures with the Board of Elections pursuant to Section 3513.05 of the Ohio Revised Code.

10. Relator further states that on or about June 27, 1968, he received a letter from the respondent director of the Cuyahoga County Board of Elections, written on behalf of the respondent members thereof, informing him that his nominating petition had been found insufficient in that it did not fulfill the seven percent requirement of 5,974 signatures for the Twenty-First Congressional District. A copy of the said letter is marked Exhibit A, attached hereto and incorporated as part of this petition.

11. Relator says that he objected to the said finding of insufficiency, that he asked for a hearing with the respondent members of the Cuyahoga County Board of Elections, but that the said respondents affirmed their decision, holding his petition insufficient, and barring him from the ballot in the November 5, 1968, general election as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District.

12. Relator says that the said seven percent requirement is unreasonably high and excessive, that it is disproportionate when compared to the 100 signatures required for party candidates, that it is arbitrary and capricious, that it constitutes an invidious discrimination without any relationship to constitutionally justified ends, that its effect is to disfranchise relator and other independent voters, and that it is therefore unconstitutional and void.

13. Relator says that the said seven percent requirement, first included in an amendment to Section 4785-91 of the Ohio General Code and later incorporated in Section 3513.257 of the Ohio Revised Code, being void and unconstitutional, the proper criterion for determining the sufficiency of his petition is the one percent requirement

previously adopted and enacted into law by the Ohio Senate and General Assembly.

14. Relator says that he filed valid signatures on his nominating petition numbering in excess of one percent of the number of voters for governor in the Ohio Twenty-First Congressional District in the last gubernatorial election (see Exhibit A); that he has therefore qualified as an independent candidate for Congress in the said district; that the respondent members and director of the Board of Elections of Cuyahoga County have a clear, absolute, unequivocal, specific, and mandatory duty to certify the sufficiency of relator's petition and to do all things necessary to have his name placed on the ballot; that the respondent Secretary of State has a clear, absolute, unequivocal, specific, and mandatory duty to certify relator's name on the ballot; that the respondents Governor of the State of Ohio and Attorney-General of the State of Ohio have a clear, absolute, unequivocal, specific, and mandatory duty to enforce the statutes of the State of Ohio and to maintain, implement, execute, protect, and defend the right of relator as an independent candidate for political office in Ohio to have his name printed on the ballot on the basis of constitutionally acceptable signature requirements as provided by law.

15. Relator says that unless he is duly certified as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District, his fundamental constitutional rights will be abridged, to wit:

a. His basic constitutional right to be a candidate for an office for which he is otherwise qualified. Article I, Section II of the United States Constitution.

b. His right to Equal Protection of the Laws guaranteed by Amendment XIV of the United States Constitution, a right abridged by the seven percent requirement for independent candidates set forth in Section 3513.257 of the Ohio Revised Code.

c. His right to Due Process of Law guaranteed by Amendment XIV of the United States Constitution but vitiated by the imposition of restrictive and repressive electoral legislation designed to prevent independent candidates from seeking political office in Ohio and devised to disfranchise independent voters who are unwilling to vote for the party candidates.

d. His right to free speech as a duly qualified political candidate for office, guaranteed by Amendment I of the United States Constitution.

e. His right to run for political office and to vote for a candidate of his choice, rights guaranteed citizens of the United States by the privileges and immunities clause of Article IV, Section II and Amendment XIV of the United States Constitution.

f. His right to participate in a republican form of government guaranteed by Article IV, Section IV of the United States Constitution.

g. His right to equal protection and benefit of government with no special privileges granted to others, a right guaranteed by Article I, Section II of the Ohio Constitution.

16. Relator says that unless this Court issues a temporary restraining order as hereinafter requested, the respondent members and deputy of the Board of Elections will, in the ordinary course of events, cause to be commenced the printing of ballots for the November 5, 1968, election, without including thereon the name of relator as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District; and should this Court determine that relator's name should properly be placed upon the ballot, then the printing of the said ballots without his name will have been for nought.

17. Relator says he has no plain and adequate remedy in the ordinary course of the law.

WHEREFORE, relator prays that this Court:

1. Issue an immediate order restraining the respondent members and director of the Board of Elections of Cuyahoga County and their agents and employees from printing or causing to be printed ballots for the office of United States House of Representatives from the Ohio Twenty-First Congressional District for the November 5, 1968, election until further order of this Court.

2. Issue a Writ of Mandamus commanding the respondent members and deputy of the Board of Elections of Cuyahoga County to certify the sufficiency of relator's nominating petition and directing all respondents herein to do all things necessary to place relator's name upon the ballot as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District in the November 5, 1968, general election; or in the alternative, show cause in this Court, at a time to be fixed, why they should not be required to do so.

3. Give judgment to relator against the respondents herein for relator's costs and expenses, including reasonable attorneys' fees, incurred in connection with this action, and for such other and further relief as may be proper.

BENJAMIN B. SHEERER,
RUDD, OBER & MILLER,
JERRY GORDON,
Attorneys for Relator.

(Jurat omitted in printing.)

JOINT ANSWER OF RESPONDENTS CIPOLLONE, CARNEY, DUFFY, HUGHES AND STILLMAN, IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

(Filed July 31, 1968; title omitted in printing.)

Now come the Respondents, Joseph A. Cipollone, John J. Carney, Dan W. Duffy, Robert A. Hughes, and Saul G. Stillman, and for their joint answer to the petition herein, admit the allegations of numbered paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of said petition.

Further answering, the said Respondents deny each and every, all and sundry, the allegations, statements and averments contained in the petition, except for those herein specifically admitted to be true.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

By JOHN L. DOWLING,
Assistant Prosecuting Attorney,
Attorneys for Respondents.

(Jurat omitted in printing.)

ANSWER IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

(Filed July 31, 1968; title omitted in printing.)

Now come the defendants James A. Rhodes, Ted W. Brown, and William B. Saxbe, not intending to waive their previous objections to the jurisdiction of this Court and for their answer say:

1. These respondents admit that James A. Rhodes is the duly elected, qualified, and acting Governor of the State of Ohio with his office and official residence in Columbus, Ohio.

2. These respondents admit that Ted W. Brown is the duly elected, qualified, and acting Secretary of State of Ohio with his office and official residence in Columbus, Ohio.

3. These respondents admit that William B. Saxbe is the duly elected, qualified, and acting Attorney General of the State of Ohio with his office and official residence in Columbus, Ohio.

4. These respondents admit that, by the requirements of Section 3513.257, Revised Code, the nominating petition of an independent candidate for the office of district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district.

5. Respondents admit the existence of Sections 3505.38, 3501.04, 3505.01, 109.02, 3505.35, 3519.01, 3513.06, 3513.271, 3513.13, 3513.05, 3513.262, 3513.257, Revised Code, but respondents do not agree with all the interpretations alleged by relator in connection with said sections.

6. Respondents generally deny all other allegations made in the petition not specifically admitted herein.

Respondents answering further state that the relator has failed to allege facts that make it clearly appear that the performance of the act sought by him is one which the law *specially* enjoins as a duty resulting from an office, trust, or station of these respondents.

Wherefore these respondents pray that the petition for a writ of mandamus and application for a temporary restraining order be dismissed with costs to the relator.

Respectfully submitted,

WILLIAM B. SAXBE,
Attorney General,

JULIUS J. NEMETH,
Assistant Attorney General,

WILLIAM J. LEE,
Assistant Attorney General,

Attorneys for Respondents
Rhodes, Brown and Saxbe.

(Certificate of service omitted in printing.)

RELATOR'S BILL OF EXCEPTIONS IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

(Title omitted in printing.)

* * * * *

(3)

BE IT REMEMBERED, That at the April, A.D. 1968 Term of said Court, to-wit, on the 6th day of August, 1968, this cause came on to be heard before the Hon. Perry B. Jackson, one of the Judges of said Court, in Courtroom Number Thirteen.

Thereupon, the following proceedings were had:

The Court: Good morning. The Plaintiff may make an opening statement, if he so desires, or Relator.

Mr. Gordon: Thank you, your Honor.

The Court: Is there a separation of witnesses desired?

Mr. Gordon: We have no request for same.

Mr. Dowling: None from the Board of (4) Elections.

The Court: All right.

Mr. Nemeth: None from us.

(Thereupon, opening statements were made by Mr. Gordon and Mr. Dowling on behalf of their respective clients, after which the following proceedings were had:)

Mr. Nemeth: The Attorney General waives opening statement.

The Court: I didn't hear it.

Mr. Nemeth: The Attorney General's office waives opening statement.

The Court: The Relator may call its first witness.

Mr. Gordon: Your Honor, Relator calls John Schimmels under the statute for cross-examination.

(5) Thereupon, the Relator called as a witness on cross-examination JOHN H. SCHIMMELS, who, being first duly sworn, testified as follows:

CROSS EXAMINATION OF JOHN H. SCHIMMELS.

The Court: You have to speak up a little loud. We have got a fan going here and everything else, trying to keep as cool as we can. Speak as loud as you can.

The Witness: All right.

By Mr. Gordon:

Q. Will you please state your full name? A. John H. Schimmels, S-c-h-i-m-m-e-l-s.

Q. Where do you reside, Mr. Schimmels? A. Cleveland Heights, 1637 Glenmont Road, Cleveland Heights 18.

Q. And where are you employed? A. Board of Elections.

Q. And that would be the Board of Elections of Cuyahoga County? A. Cuyahoga County, yes, sir.

Q. Where are they located? A. 623 St. Clair Avenue.

Q. And how long have you been so employed? A. Since February 5th of 1968.

Q. And, Mr. Schimmels, what is your capacity there at the (6) Board of Elections? A. I am in charge of the Ballot Department and also the check of the petitions.

Q. And can you briefly tell us what some of your duties are? A. Well, basically, the idea of making up the ballot and make sure that it is correct and prior to making up the ballot petitions are filed to run as candidate for an office, these petitions are first checked at the Registration Department and the final check comes downstairs where I double check or triple check, in many cases, any cause for error.

Q. Now, who is the Deputy Director of the Board of Elections of Cuyahoga County, Ohio? A. Mr. Paul DeGrandis.

Q. And who is the Director? A. Mr. Joseph Cipollone.

Q. Who are the members of the Board of Elections of Cuyahoga County? A. Mr. Dan Duffy, Mr. Jim Carney or Jim Carney, yes.

The Court: James.

A. James.

Mr. Dowling: It is actually John, your Honor.

A. Mr. Saul Stillman and Mr. Robert Hughes.

Q. And the members of the Board of Elections are appointed, (7) are they not, by the Secretary of State? A. Yes.

Q. And that would be Mr. Ted W. Brown? A. Yes.

Q. Now, Mr. Schimmels, do you know of your own personal knowledge as to whether Mr. Paul Brockington filed a nominating petition as an independent candidate for the 22nd Congressional District on February 19th of this year? A. He did.

Q. And isn't it a fact that by virtue of special state statute stemming from the redistricting that February 19th was a timely date to file nominating petitions?

Mr. Dowling: Object to the form of the question and actually at this point, your Honor, I have to object to cross-examination of this witness, since there is no showing that the particular acts complained of in here are done through this agent and that he is subject to cross-examination. That is, only the Board can undertake the qualification or disqualification of nominating petitions.

Mr. Gordon: Your Honor, I'd like to inform the Court that we had subpoenaed Mr. Cipollone and that Mr. Cipollone requested that he be excused from subpoena in order to attend the convention at (8) Miami, and that we agreed to this request conditioned upon his producing for this hearing an authorized agent, and I think that under the circumstances we should certainly be permitted to cross-examine.

Mr. Dowling: Mr. Cipollone would not properly be cross-examined as to official action of the Board of Elections, your Honor.

The Court: Well, someone would have the record, official record of the Board of Elections, the minutes.

Mr. Dowling: Yes, your Honor, I think we can go to that, but what I object to is the cross-examination of a man who does not qualify under the statute, whom the Relator is not qualified under the statute to cross-examine as an agent by whom something was done by the principal.

Mr. Gordon: Well, your Honor, as I indicate, the original subpoena went to Mr. Cipollone, who is a named Respondent, and certainly he as Director of the Board of Elections is an authorized agent and I think in view of the fact that we cooperated with Mr. Cipollone in agreeing not to enforce that subpoena that it would be taking undue advantage of us to preclude us this cross-examination of this witness who appears in his stead.

(9) Mr. Dowling: Well, I was no party to a stipulation that somebody else could appear for Cipollone. As a matter of fact, I don't even know whether, as or if a subpoena was served on Cipollone, your Honor.

The Court: Are you objecting to all cross-examination or just on specific points over which he has no control?

Mr. Dowling: Yes, I object to all cross-examination, your Honor, because, number one, Mr. Schimmels is not a party to this lawsuit; number two, there is no showing that he acted as an agent. As a matter of fact, the statutory duties of the Board of Elections can not be delegated to an agent. The statutory duty would be the acceptance or rejection of the nominating petitions in this case.

The Court: Well, he can testify as to what he, himself, did.

Mr. Dowling: Yes, your Honor, I would—on direct examination, not cross. Yes.

The Court: Sustain the objection.

Mr. Dowling: Your Honor, sustain the objection?

The Court: Yes.
Mr. Dowling: Thank you.

(10) Q. All right. Mr. Schimmels, can you tell us whether filing petitions on February 19th was timely? A. That was the last day for filing those petitions, yes.

Q. And was Mr. Brockington's petitions filed on that date? A. I don't remember the exact date. It could have been before the 19th.

Q. Well, let me ask you this: In the course of examining and considering his petition was any question ever raised, to your knowledge, concerning whether or not it was timely filed? A. Not to my knowledge.

Q. Now, Mr. Schimmels, in the course of your work at the Board of Elections have you had occasion to see Mr. Cipollone's signature? A. Yes.

The Court: In the joint answer of the Board of Elections Mr. Cipollone admits the allegation of Paragraph 9, which relates to that on or about February 19th, the time fixed by the special statute, Relator filed nominating petitions, and it also includes the admission, Paragraph 10 of Relator's petition that he alleges that on the 27th of June, '68, received his letter from Respondent Director relating to not complying, and also 11 (11) in the objection to the finding of the Board of Elections, so those are admitted by the prosecutor representing the officials of the Board of Elections, so it is not necessary for Relator to prove those.

Now, as the Court understands it, the assignment of Relator is to prove to the Court that the number of signatures is proper under the provisions of the Constitution, and frankly it almost boils down to questions of law rather than—unless Plaintiff has some—Relator has some of that, the intent of the legislators at the time, how it is possible to show that at the time the law was passed what was in the minds of the legislators by certain discussions in their committee hearings and so forth, to go back in to see what was

the intent of the legislators in fixing seven per cent as against the original one per cent.

Now, if you have any evidence on that point, the Court would be interested in hearing testimony as to that, but as far as what took place at the Board of Elections it seems to the Court that the Board—that the prosecutor has admitted everything that Relator says happened at the Board of Elections.

Mr. Gordon: Yes, that's true, your Honor. The only reason that we are pursuing this line of (12) inquiry is because we have other Respondents in the case, the Governor, the Secretary of State and the Attorney General, who have not made such admissions. Now, if they are prepared to stipulate, then of course this present line of inquiry would not be necessary. That's been our problem.

Mr. Dowling: Essentially all that they admit is the provision of the statute.

The Court: Yes. Does the Attorney General on behalf of the state officers desire at this time to admit the matters that took place at the Board of Elections, without waiving your further contentions, of course, that the state officers are not involved?

Mr. Nemeth: Yes, your Honor, I believe we can do that.

The Court: All right. Is that satisfactory?

Mr. Gordon: That is, your Honor.

The Court: Let the record show that the Attorney General on behalf of the named Respondents, Governor Rhodes, the Attorney General and the Secretary of State admit the same as the Board of Elections representatives as to what took place at the Board of Elections. (13) Does that state it properly?

Mr. Nemeth: Yes, your Honor.

The Court: Is that correct?

Mr. Nemeth: Yes.

Mr. Gordon: All right, your Honor. I think we can conclude our questioning rather briefly. I would like to have this marked, as Relator's Exhibit 1.

A letter was marked as Relator's Exhibit 1, for identification.

Q. Mr. Schimmels, handing you what has been marked for identification as Relator's Exhibit 1, I ask you, sir, do you recognize the signature on that letter? A. Yes.

Mr. Dowling: Your Honor, I think I could save a little time by saying that we are willing to stipulate to the authenticity and admissibility and everything else with regard to that document.

The Court: All right. May I see it?

Mr. Gordon: All right. We will offer this in evidence, your Honor.

The Court: Does the Attorney General also (14) stipulate?

Mr. Nemeth: Yes, your Honor.

The Court: All right. Let the record show that the Attorney General, the County Prosecutor and Relator's attorney stipulate that Relator's Exhibit Number 1 may be received.

Q. All right. Mr. Schimmels, just one more matter and I think we will be concluded. Did you at our request bring to this Court the figures from the Board of Elections showing the vote for Governor in each of the four Congressional Districts from Cuyahoga County? A. Yes.

Q. And would you please give us those figures by District?

Mr. Dowling: Your Honor, since we are involved with the 21st District, I fail to see any relevance to the 20th, 22nd or 23rd.

Mr. Gordon: Your Honor, I think it is basic that in challenging the constitutionality of a law, this is under the Stromberg case, and under the Thornhill versus Alabama we are entitled to test all the possible applications of the statute including to other persons and this is quite important in this lawsuit, that we know the statistics in the other Congressional Districts. (15) It is a matter of public record, although hard for us to come by.

The Court: Overrule the objection.

Q. All right. Will you please indicate—

Mr. Dowling: Your Honor, if I may, I was just going to argue to the Court that there is no allegation in this petition that seven per cent is required of Paul Brockington or any other candidate in the 21st and not required of candidates in the 22nd, 23rd or the 1st to the 19th, as the case may be.

The Court: Now, this is a general provision that applies pretty generally to most of the candidates that might file as independents; the County Commissioners, state officers, judges and so forth.

Mr. Gordon: All right.

The Court: I think that may be answered.

Q. All right. Would you give us those figures, please? A. In the 20th Congressional district, the total votes for Governor of November 8, 1966, 79,585. The 21st Congressional District, 90,507. In the 22nd Congressional District, 139,322 and in the 23rd Congressional District, 146,863.

Mr. Gordon: Thank you very much. No further (16) questions.

The Court: All right. You may be excused.

Mr. Gordon: If it please the Court, Relator calls the Relator, Paul Brockington.

---

(17) Thereupon, the Relator, further to maintain the issues on his part to be maintained, offered himself as a witness, who, being first duly sworn, testified as follows:

DIRECT EXAMINATION OF PAUL M. BROCKINGTON.

By Mr. Sheerer:

Q. Will you state your name, please? A. My name is Paul M. Brockington.

Q. And your address? A. 12815 Austin Avenue, Cleveland 8, Ohio.

Q. How long have you resided at this address? A. A little more than four years.

Q. And before that where did you reside? A. 744 East 127th Street.

Q. Is that in Cleveland? A. Cleveland 8, Ohio.

Q. How long have you been a resident of the state of Ohio? A. Seven years.

Q. Pardon me? A. Seven years.

Q. Tell the Court your place of birth. A. Okahumpka, Florida.

Q. And the year? A. 1923.

Q. You are presently how old? **(18)** A. 45.

Q. Are you married? A. Yes, I am.

Q. Do you have children? A. Three; two boys and one girl.

Q. Do they reside with you? A. Yes.

Q. Briefly tell the Court your education, what education you have. A. Well, I have a B.S. degree—

Mr. Dowling: Object, your Honor.

Q. And what? A. A master's degree, an A. M. degree.

The Court: It is not necessary. That isn't one of the requirements or the qualifications for public office.

Mr. Sheerer: That is true, your Honor, but the Respondents have said that they wanted to see that our Relator was flesh and blood and—

The Court: All right, we will let it stand. It is not necessary to continue it, to go into anything except his qualifications as provided by the law.

Q. Did there come a time in this year, 1968, that you decided to run for office? **(19)** A. Beg your pardon?

Q. Did there come a time in the year of 1968 that you decided to run for office? A. Yes.

Q. What office was that? A. The office of Congress of the 21st District.

Q. In what manner were you going to run for that office? A. As an independent.

Q. To that end did you secure nominating petitions? A. I did.

Q. And did you circulate them? A. Yes.

Q. And file them with the Board of Elections A. I did.

Q. Will you briefly describe how your petitions were circulated? A. Well, I—

The Court: Unless you want to get something in the record, I think that the Board of Elections—has stipulated—

Mr. Dowling: Yes, your Honor.

The Court: —stipulated everything with relation to that and unless the Attorney General wants to—

Mr. Dowling: There is no issue, I believe, (20) your Honor, as to the fact that a certain number, 800 and some odd signatures were found to be valid; that the petitions were valid to that extent and that the petition has not raised any question with regard to invalidating certain petitions.

The Court: Well this is further examination to show that he is flesh and blood, well qualified to be in Congress. Someone reviewing the record might raise the question if he only had a third grade education, or something like that, that might influence them.

Mr. Dowling: Not our Appellate Court, your Honor.

The Court: I am sure not.

Mr. Sherrer: That would conclude our examination, your Honor.

The Court: Do you desire to cross-examine the Relator?

Mr. Dowling: Possibly one or two questions, your Honor.

CROSS EXAMINATION OF PAUL M. BROCKINGTON.

By Mr. Dowling:

Q. Mr. Brockington, were you a candidate for any other office in this year of 1968? A. No, I was not.

(21) Q. Did you file petitions with the Board of Elections for any other office in this year of 1968? A. I did not.

Q. Did you vote in the primary election held in May of this year? A. I did, yes.

Mr. Gordon: Object.

The Court: Overruled.

Mr. Gordon: Object as to how he votes, your Honor. That is his private prerogative.

The Court: Overruled.

Mr. Dowling: It is a matter of public record if he voted in the primary.

The Court: Overruled.

Q. You voted in the Democratic primary, sir? A. Yes.

Q. That was in May of 1968? A. Yes.

Q. And that was after you had filed your petitions as an independent candidate for Congress? A. Yes.

The Court: But you did not file in the Democratic primary for this office?

A. No.

Q. If I may be permitted, your Honor, I would just like (22) to check my notes for a moment or two. Have you continuously resided in the United States since your birth? A. Yes.

Mr. Dowling: No further questions, your Honor.

The Court: What is your occupation, Mr. Brockington?

A. I am an educator and administrator—

The Court: In the what?

A. In the—

The Court: Public schools?

A. Poverty programs.

The Court: Any questions?

Mr. Nemeth: No questions.

The Court: Anything further?

Mr. Sheerer: Just a question, your Honor.

RE-DIRECT EXAMINATION OF PAUL M. BROCKINGTON.

By Mr. Sheerer:

Q. On February 19, 1968, when you filed your petitions with the Board of Elections, was any indication given to you at that time of their sufficiency? A. No.

Q. Was any question raised as to the number of signatures at that time? A. No.

(23) Q. Were you told at that time that you had enough signatures?

Mr. Dowling: Object.

A. No.

The Court: It doesn't make any difference, anyway. These are administerial employees that take the petitions. The Board of Elections itself certifies that he had a certain number of signatures and of course—all right, anything further?

Mr. Sheerer: That would conclude it.

Mr. Dowling: Do you rest?

Mr. Gordon: Your Honor, the Relator rests.

The Court: Any evidence on behalf of any of the Respondents?

Mr. Dowling: Your Honor, the Board of Elections and Joseph Cipollone rest.

Mr. Nemeth: The State of Ohio rests.

The Court: Argument?

Mr. Gordon: Yes, your Honor. First of all I would like to tell the Court that this morning on our way up here we filed a brief and it has been filed and docketed and I want to make it available to the Court, here.

The Court: It looks rather voluminous.

Mr. Gordon: It will give you some reading matter for the hot summer months.

(24) The Court: I assume this brief, a copy of it has been given to Respondents.

Mr. Gordon: Yes, it has, your Honor, right now.

(Thereupon, closing arguments were made to the Court by counsel for the respective parties, at the end of which the following proceedings were had:)

The Court: Gentlemen, the Court thanks you. This is an interesting and important question. The Court will mark it heard and submitted. After receiving the briefs I will render a decision.

There is no question in the Court's mind, I don't think as far as the evidence is concerned, that the Relator, Paul M. Brockington, is qualified as far as the Constitution goes for holding such an office. The question primarily is one whether the legislative provision for seven per cent is properly within the police powers of the Legislature and whether—what is the effect if the Court determines that this is an unreasonable and exorbitant requirement and what is the Court's duty with respect to the proceedings in mandamus.

The Court says this without excluding other questions that are raised both by the Relator and (25) the Respondents. Thank you very much. The matter is concluded at this point.

The above and foregoing, together with all exhibits offered and received in evidence, was all of the evidence offered and received upon the trial of the above-entitled cause in the said Court of Common Pleas in and for Cuyahoga County, Ohio.

MEMORANDUM OF OPINION.

(August 22, 1968.)

Case No. 863,239.

IN THE COURT OF COMMON PLEAS.

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

STATE OF OHIO, ON THE RELATION OF PAUL M. BROCKINGTON,

Relator,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, *et al.*,

Respondents.

PERRY B. JACKSON, *J.*:

This cause, an action seeking the issuance of a writ of mandamus, came on for hearing August 8, 1968.

Relator, Paul M. Brockington, on February 19, 1968, filed nominating petitions for the office of congressman in Ohio's 21st congressional district, with the Cuyahoga County Board of Elections, a named respondent herein. Relator sought to be placed on the November, 1968 ballot as an independent candidate.

On June 26, 1968, the Board of Elections advised relator that his petitions contained 899 valid signatures, and that the number of valid signatures required to be placed on the ballot in the November, 1968, general election was 5,974. (See relator's exhibit X-1.) Relator requested a hearing with the Board of Elections, which was granted. Following said hearing, the Board of Elections affirmed its decision, finding relator's nominating petitions to be insufficient.

On July 10, 1968, relator filed his petition for a writ of mandamus with this court, asking that Ohio Revised Code § 3513.257, which prescribes the requirements of

nominating petitions of independent candidates for the office of district representative to congress be held to be unconstitutional and that respondents be ordered to place relator's name on the ballot.

Ohio Revised Code § 3513.257, states in pertinent part:

> "The nominating petition of an independent candidate for the office of representative to the general assembly, senator of the general assembly, and district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district."

In an action in mandamus, the relator has the burden of establishing a clear right to the relief sought. He must not only establish that the act which he seeks to compel respondents to perform is one that they are constitutionally bound to perform by virtue of their offices, but also that he, the relator, has a clear right to have the duty enforced.

In the case of *State ex rel. Baker v. Hanefeld, et al.*, 134 Ohio St. 540 (1938), the Court stated that a relator

> "must establish a clear legal right to the extraordinary remedy." 134 Ohio St. 541.

Similarly, in the recent case of *State ex rel. Baines v. Parrino*, 174 Ohio St. 531 (1963), the Court stated

> "It is axiomatic that a clear legal right must be established before a writ of mandamus will issue." 174 Ohio St. 531.

The burden of establishing a clear legal right is on the relator, and if upon all of the evidence presented, relator's clear legal right is not established, the writ must be refused.

This Court finds that the relator has not established by the evidence, his legal right to have a writ of mandamus issue. Therefore, without passing on the merits of

the legal issues raised by the respective parties, the Court is of the opinion that a writ of mandamus may not issue in this case.

Writ denied.

PERRY B. JACKSON, *Judge.*

DOCKET ENTRIES IN THE COURT OF APPEALS OF CUYAHOGA COUNTY.

September 4, 1968. Transcript and original papers from Common Pleas Court filed.

September 4, 1968. Motion to advance filed.

September 4, 1968. Motion for temporary injunction filed.

September 9, 1968. Brief and Assignment of Errors and Exhibit of Relator-Appellant (2) copies filed.

September 11, 1968. Brief of Respondents-Appellees (2) copies filed.

September 12, 1968. Relator's Bill of Exceptions filed.

September 12, 1968. Motion for order placing Relator-Appellant's name on ballot filed.

September 13, 1968. No. 19,273. To Court: Motion by appellant to advance cause for hearing granted. Appellant to file brief by September 14, 1968; Appellees to file brief by September 17, 1968, after which the case will be set down for an early hearing. Exceptions. (Signed) Daniel H. Wasserman, Chief Justice. Received for filing September 13, 1968. E. J. Masgay, Clerk By H. Kwarciany, Deputy. (Journal Book 34, Page 466.)

September 13, 1968. No. 19,272. To Court: Motion by appellant for temporary injunction overruled. Exceptions. (Signed) Daniel H. Wasserman, Chief Justice. Received for filing Sept. 13, 1968. E. J. Masgay, Clerk

By H. Kwarciany, Deputy. (Journal Book 34, Page 467.)

September 14, 1968. Memorandum of Respondents in opposition to Motion of Relator for order placing his name on ballot (2) copies filed.

September 14, 1968. Brief of Respondents-Appellees (2) copies filed.

September 17, 1968. Relator-Appellant's reply brief (2) copies filed.

September 18, 1968. To Court: Motion by relator appellant for order placing his name on ballot. Referred to panel hearing case on merits. (Signed) Joseph H. Silbert, Presiding Judge. (Journal Book 34, Page 479.)

September 30, 1968. To Court: Motion by relator-appellant for order placing his name on ballot overruled. Exceptions. (Signed) Daniel H. Wasserman, Chief Justice. Received for filing Sept. 30, 1968. E. J. Masgay, Clerk By H. Kwarciany, Deputy. (Journal Book 34, Page 516.)

October 1, 1968. To Court: Journal Entry as follows, to-wit:

JOURNAL ENTRY OF THE COURT OF APPEALS.

No. 29,401.

IN THE COURT OF APPEALS

FOR THE EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO.

STATE OF OHIO, *ex rel.* PAUL M. BROCKINGTON,
Relator-Appellant,

vs.

JAMES A. RHODES, *et al.*,
Respondents-Appellees.

Date: October 1, 1968.

This cause came on to be heard on the appeal on question of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration and a full reading of the entire record, the court finds no error prejudicial to the appellant and finds that the relator-appellant has shown no legal right to the relief requested. Therefore, the judgment of the Common Pleas Court is affirmed and it is ordered that appellees recover of appellant their costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

DOCKET ENTRIES IN THE SUPREME COURT OF OHIO.

Case No. 68-576.

THE SUPREME COURT OF OHIO,
January Term, 1968.

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,
Appellant,

v.

JAMES A. RHODES, *et al.*,
Appellees.

October 7, 1968. Notice of Appeal, Memorandum and Certificate of Service filed.

October 10, 1968. Memorandum of Appellees, Board of Election and Certificate of Service filed.

October 14, 1968. Memorandum of Appellees, Rhodes et al., and Certificate of Service filed.

October 16, 1968. Hearing on the Motion.

October 23, 1968. Motion to Certify Record, Overruled. J. 49-100.

October 23, 1968. Dismissed sua sponte substantial constitutional question involved. J. 49-102.

October 23, 1968. Mandate Issued.

October 23, 1968. Certified copy of Entry sent Clerk.

November 18, 1968. Precipe to United States Supreme Court filed.

Jan. 6, 1969. Notice of Appeal to U. S. Supreme Court filed.

JOURNAL ENTRIES OF THE SUPREME COURT OF OHIO.

Journal 49, Page 100:

Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify Its Record.

It is ordered by the Court that this motion is overruled.

Journal 49, Page 102

Appeal from the Court of Appeals for Cuyahoga County.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

LIBRARY
SUPREME COURT, U. S.

JAN 8 . 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 31

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

JURISDICTIONAL STATEMENT
In Support of Appeal From the Supreme Court of Ohio.

RALPH RUDD,
c/o American Civil Liberties
Union of Ohio,
Suite 210, 33 Public Square,
Cleveland, Ohio,
Counsel for Appellant.

JERRY GORDON,
BENJAMIN B. SHEERER,
Of Counsel.

THE GATES LEGAL PUBLISHING CO. CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Opinions in the Courts Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

Substantiality of the Federal Constitutional Questions Involved 7

A. There is a clear conflict between the decision of the three-judge federal district court in Socialist Labor Party v. Rhodes, 290 F. Supp. 983 (S.D. Ohio 1968), as affirmed and modified by this Court on October 15, 1968, sub nom. Williams v. Rhodes, ,U.S. , 21 L. Ed. 2d 24 and the decision below in the instant case 7

B. If the seven percent statute is permitted to stand, independents will continue to be excluded from Ohio's electoral process 9

C. This case offers the Court a valuable opportunity for formulating more specific guidelines in an area where the absence of guidelines has demonstrably resulted in the disfranchisement of minority political groupings 9

D. The issues posited by this case are peculiarly ripe for resolution now 11

Conclusion 13

Appendix:

Memorandum of Opinion of the Court of Common Pleas 15

Journal Entry of the Court of Appeals For the Eighth Judicial District, Cuyahoga County, Ohio 17

Journal Entry of the Supreme Court of the State of Ohio 17

TABLE OF AUTHORITIES.

Cases.

Bd. of Elections for Franklin County v. State, Ex Rel. Schneider, 128 Ohio St. 273, 191 N.E. 115 (1934) 11

Boggess v. Berry Corporation, 233 F. 2d 389 (9th C.A., 1956) 12

Boise City Irr. & Land Co. v. Clark, 131 F. 415 (9th Cir., 1904) 13

Carrington v. Rash, 380 U.S. 89 (1965) 10

Carroll v. Commissioners of Princess Anne, U.S. , 21 L. ed. 2d 325 (November 19, 1968) 12

Carroll v. Schneider, 211 Ark. 538, 201 S.W. 2d 221 (1947) 12

Harper v. Virginia Bd. of Election, 383 U.S. 663 (1966) 10

Love v. Griffith, 266 U.S. 32 (1924) 12

Meck v. Board of Elections, 111 Ohio St. 203, 145 N.E. 28 (1924) 5

Meyers v. Jay Street Connecting Railroad, 288 F. 2d 356 (2nd C.A., 1961) 12

People ex rel. Hotchkiss v. Smith, 206 N.Y. 231, 99 N.E. 568 (1912) 11

People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E. 2d 769 (1952) 13

Sartin v. Barlow, 196 Miss. 159, 16 So. 2d 372 (1944) 13

Schneider v. State, 308 U.S. 147 (1939) 10

Socialist Labor Party v. Rhodes, 290 F. Supp. 983 (S.D. Ohio 1968) 7

United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897) 12

Von Hoffman v. Quincy, 71 U.S. (4 Wall.) 535 (1867) 10-11

Wesberry v. Sanders, 376 U.S. 1 (1964) 9-10

Williams v. Rhodes, U.S. , 21 L. Ed. 2d 24 (October 15, 1968) 2, 6, 7, 9, 11, 13

Constitution and Statutes.

Constitution of the United States:

Amendment I 3, 6, 8

Amendment XIV 3, 5, 6, 8

Ohio Revised Code:

Sec. 3513.05 4

Sec. 3513.257 3, 4, 5, 6

Ohio General Code, Sec. 4785-91 4

Other.

Ohio Election Statistics, issued by the Ohio Secretary of State 5

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. . . .

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

JURISDICTIONAL STATEMENT
In Support of Appeal From the Supreme Court of Ohio.

OPINIONS IN THE COURTS BELOW.

Neither the Supreme Court of Ohio nor the Court of Appeals for the Eighth Judicial District of Ohio issued an opinion. A copy of the Journal Entry filed in each court is set forth in Appendix, p. 17.

The opinion of the Court of Common Pleas of Cuyahoga County, Ohio has not been published. A copy of this opinion is set forth in Appendix, p. 15.

JURISDICTION.

The appellant asks that this appeal be granted to review the judgment of the Ohio Supreme Court dismissing appellant's appeal entered on October 23, 1968. Appellant claims that his rights were violated contrary to the First and Fourteenth Amendments to the Constitution of the United States. Notice of appeal was filed with the Ohio Supreme Court on January 5, 1969.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1257 and 2101. The Court's jurisdiction is sustained by *Williams v. Rhodes*, U.S. , 21 L. ed. 2d 24 (October 15, 1968).

QUESTIONS PRESENTED.

1. In view of the holding of this Court in *Williams v. Rhodes*, U.S. , 21 L. ed. 2d 24 (October 15, 1968) which invalidated those Ohio Election Laws which operated to exclude third parties and independent candidates from Ohio's election process, is not the seven percent statute attacked here void as unconstitutional?

2. Where the participation of independent candidates in a state's electoral process is neither substantial nor disruptive under a statute requiring independent candidates to file nominating petitions containing signatures equal in number to *one* percent of those who last voted for governor in the district, can a State constitutionally revoke the one percent statute and impose in its stead a *seven* percent requirement?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

Amendment I:

> Congress shall make no law * * * abridging the freedom of speech * * *

Amendment XIV:

> * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code.

Section 3513.257:

> The nominating petition of an independent candidate for the office of senator of the general assembly, and district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district. The nominating petition of independent candidates for the office of judge of the court of appeals shall be signed by qualified electors not less in number than seven per cent of the number of electors who voted for governor at the next preceding regular state election in the territory over which such court has jurisdiction, or twenty-five hundred electors, whichever is the lesser number.
>
> No such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum aggregate number of signatures required by this section. If the district consists of more than one county, such petition shall contain the signa-

tures of at least fifty electors from each of at least one-half of the several counties of such district. Such petition shall be filed with the board of elections of that county or part of a county within the district which had a population greater than that of any other county or part of a county within the district according to the last federal decennial census, not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

STATEMENT OF THE CASE.

Appellant was an independent candidate for the United States House of Representatives from the Twenty-First Congressional District of Ohio in the November, 1968, election. To obtain a place on the Ohio ballot he filed nominating petitions proper in all respects save one; his petitions did not contain the number of signatures required by Section 3513.257, Ohio Revised Code. That statute requires an independent candidate for Congress to file signatures equal in number to seven percent of the votes cast for governor in the Congressional District in the last gubernatorial election. In appellant's case this was 5,974 signatures.[1]

Appellant submitted 899 valid signatures. This would have been sufficient under the previous Ohio law which had been in effect for *over 70 years* and which required independent candidates to file *one* percent in order to qualify for the ballot. (See Section 4785-91, Ohio General Code before amendment in 1952.) In the decade previous to 1952, only a tiny number of candidates ran for Congress

[1] In Ohio's 23rd Congressional District the requirement in 1968 was 5,281 for an independent candidate. By contrast, party candidates qualify for the primary by filing only 100 signatures. Section 3513.05, Ohio Revised Code.

as independents. The figures on a state scale are as follows:

Year	Number of Independent Candidates for Congress
1940	1
1942	2
1944	1
1946	2
1948	1
1950	2

Thus, out of some 150 Ohio Congressional races in this period, there were but 9 independent candidacies and never more than one in any Congressional District. Since 1956, there has been but one independent candidate for Congress on the ballot in Ohio.

After the Board of Elections of Cuyahoga County refused his petitions, Appellant filed suit for a writ of mandamus in the Court of Common Pleas of Cuyahoga County, Ohio. He asked the court to hold Section 3513.257 Ohio Revised Code unconstitutional and void. In his initial pleading he alleged in part:

> "15. Relator says that unless he is duly certified an independent candidate for (sic) United States House of Representatives from the Ohio Twenty-First Congressional District, his fundamental constitutional rights will be abridged, to wit:
>
> b. His right to Equal Protection of the Laws guaranteed by Amendment XIV of the United States

The figures are taken from Ohio Election Statistics, a document issued by the Ohio Secretary of State. The contents of the publication are subject to judicial notice; see Mack v. Board of Elections, 111 Ohio St. 203, 145 N.E. 28, 30 (1924). The statistics quoted above, whose accuracy has never been disputed, were brought to the attention of the trial court and the Court of Appeals.

stitution, a right abridged by the seven percent requirement for independent candidates set forth in [illegible] of the Ohio Revised Code.

c. His right to Due Process of Law guaranteed by [illegible] of the United States Constitution is violated by the imposition of restrictive and repressive election regulations designed to prevent independent candidates from seeking political office in [illegible] and designed to disfranchise independent voters [illegible] are unwilling to vote for the party candidates.

d. His right to free speech as a duly qualified political candidate for office guaranteed by Amendment [illegible] the United States Constitution."

[illegible] court on the merits and at its conclusion [illegible] Common Pleas defined the issues as follows:

"[illegible] question in the Court's mind, I don't [illegible] as far as the evidence is concerned, that the [illegible] Paul W. Brockington is qualified as far as the [illegible] goes for holding such an office. The [illegible] primarily is one whether the legislative pro[illegible] in the seven per cent is properly within the police [illegible] of the Legislature and whether—what is the [illegible] the Court determines that this is an unreasonable and essential requirement and what is the [illegible] with respect to the proceedings in man[illegible] Bill of Exceptions 24.)

[illegible] Common Pleas denied the writ of man[illegible] opinion (Appendix, pp. 15-16). Appellant's [illegible] were raised again on appeal as assign[illegible] Section Eight, the Court of Appeals af[illegible] Common Pleas without opinion.

[illegible] was duly taken to the Ohio Supreme [illegible] for Appellant on October 16, 1968 [illegible] Court's decision in *Williams v. Rhodes*,

U.S. , 21 L. ed. 2d 24 (1968), to the attention of that court. Nevertheless, on October 23, 1968 the Ohio Supreme Court dismissed appellant's appeal *sua sponte* "for the reason that no substantial constitutional question exists herein".[3]

SUBSTANTIALITY OF THE FEDERAL CONSTITUTIONAL QUESTIONS INVOLVED.

A. There is a clear conflict between the decision of the three-judge federal district court in Socialist Labor Party v. Rhodes, 290 F. Supp. 983 (S.D. Ohio 1968), as affirmed and modified by this Court on October 15, 1968, sub nom. Williams v. Rhodes, U.S. , 21 L. Ed. 2d 24 and the decision below in the instant case.

Both majority and dissenting opinions of the three-judge district court in *Socialist Labor Party v. Rhodes*, *supra*, expressly adverted to the seven percent statute. Judge Kinneary wrote:

> "During the fifteen years period prior to 1947, participation in the electoral process by independently nominated candidates was neither substantial nor disruptive. Nevertheless in that year the Ohio General Assembly began a series of changes in the election laws which ultimately resulted in the complete elimination of independent and third party voters and candidates from Ohio's political arena."

The seven percent statute above all others drove non-Democrats and non-Republicans off the Ohio ballot. (Minor party candidates in the past had frequently quali-

[3] Appellant represented to the Courts that his name could be added to the ballot without in any way disrupting the electoral process, since printing of ballots in Cuyahoga County had been delayed. This claim was at no time questioned by any member of the Court.

fied as "independent" candidates because the Ohio laws deprived their parties of official status). After citing the sevenfold increase for political independents, Judge Kinneary concluded:

> "The express and unequivocal position taken by the courts is that any restriction on the right to vote must be closely scrutinized to insure that such restrictions are reasonable, non-discriminatory, and necessary. As evidenced both on the face of these statutes as well as in their operational effect, the restrictions imposed by the Ohio election laws do not meet these standards. The scheme of the Ohio legislature—to monopolize political power in the two major political parties—is plain * * *. *These restrictions on the availability of ballot position * * * are violative of the equal protection clause of the Fourteenth Amendment and are thus constitutionally impermissible.*" (Emphasis added.)

On appeal to this Court, Mr. Justice Black, after commending Judge Kinneary's analysis, agreed that:

> "[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." 21 L. ed. 2d at 33.

But despite these holdings that Ohio's restrictive election laws are constitutionally impermissible and constitute an invidious discrimination, and despite the fact that the seven percent statute was among the laws condemned as violative of the First and Fourteenth Amendments, the Ohio Supreme Court saw no substantial constitutional questions involved, and refused to grant appellant any relief. The conflict in views between the federal and state courts mandates clarification and resolution by this Court.

B. If the seven percent statute is permitted to stand, independents will continue to be excluded from Ohio's electoral process.

Despite this Court's landmark decision in *Williams v. Rhodes, supra*, Ohio's electoral system will remain essentially the property of the major political parties if the seven percent statute is retained.[1] *Independents and third party candidates were almost completely eliminated from the Ohio ballot as the direct and proximate result of the seven percent statute.* The Ohio Supreme Court's order in the instant case portends the perpetuation of that politically exclusionary law. Thus a system will be maintained which "denies the 'disaffected' not only a choice of leadership but a choice on the issues as well." *Williams v. Rhodes, supra*, 21 L. ed. 2d at 32, 33.

C. This case offers the Court a valuable opportunity for formulating more specific guidelines in an area where the absence of guidelines has demonstrably resulted in the disfranchisement of minority political groupings.

The action of the Ohio Legislature in increasing the requirement for independent candidates to seven percent *—when there was virtually no one qualifying under the one percent standard!*—created an arbitrary and capricious classification palpably offensive to Equal Protection and First Amendment guarantees. The failure of the Ohio courts to so decide flows from their unwillingness to apply the criteria established by this Court for testing the constitutionality of intrusions into voting rights. *Wesberry*

[1] For example, an independent candidate for state governor would have to secure more than a quarter of a million valid signatures to qualify for the ballot. This is prohibitive. By contrast, New York requires 12,000 signatures; Wisconsin 3,000; Illinois 25,000; Pennsylvania and Michigan require [illegible] and [illegible] respectively.

v. Sanders, 376 U. S. 1 (1964); *Carrington v. Rash*, 380 U. S. 89 (1965); *Harper v. Virginia Bd. of Election*, 383 U. S. 663 (1966).

It is now clear that States must show *a compelling interest* to justify the imposition of classifications which burden the right to vote. *Yet the courts below never asked appellees—nor did appellees volunteer to explain—why the requirement for independents was so drastically raised.* The question is hardly irrelevant.

> "In every case, therefore, where legislative abridgment of the rights [of speech and press] is asserted, the courts should be astute to examine the effects of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise *the substantiality of the reasons advanced* in support of the regulation of the free enjoyment of the rights." (Emphasis added.) *Schneider v. State*, 308 U. S. 147, 161 (1939).

Here there were no reasons advanced, *substantial or otherwise*, for imposing the harsher requirements for independents. Since "classifications which might invade or restrain" fundamental rights and liberties "must be closely scrutinized and carefully confined," *Harper v. Virginia Bd. of Election*, 383 U. S. 663 (1966), the seven percent statute should have been stricken and the one percent requirement which had served Ohio well for over 70 years reinstated.

Voiding of the seven percent law would have automatically reinstated the prior one percent requirement. *Von Hoffman v.*

(Continued on following page)

By allowing the writ now, this Court can further elaborate the guidelines it has been steadily developing and it can do so on the basis of a clear set of facts. Certainly this petitioner and the State of Ohio are entitled to know whether the provision attacked in this litigation comports with constitutional standards.

D. The issues posited by this case are peculiarly ripe for resolution now.

Certain of Ohio's election laws must soon be rewritten by its Legislature as a result of the Court's holding in *Williams v. Rhodes*, *supra*. If the Legislature concludes that the seven percent requirement is still viable, it may well erect its new election system on that kind of exclusionary foundation. This would herald a new wave of litigation and a reopening of all the questions just recently before this Court. Although forty-two states require third parties to obtain the signatures of only 1% or less of the electorate in order to appear on the ballot, Ohio may well continue with the repressive seven percent qualification for independents and apply that standard to third parties. If this is to be avoided, the propitious moment for decision is now.

(Continued from preceding page)

Quinn, 114 S. Ct. 804, 345 (1994); *Ritzi Elections for Franklin County v. State Ex Rel. Schneider*, 28 Ohio St. 2d 214, 101 N.E. 113 (1934); *In People ex rel. Hotchkiss v. Scholl*, 206 N.Y. 231, 99 N.E. 568 (1912), a case amazingly similar to the instant one, the New York Court of Appeals, after striking a statute imposing an unreasonably high requirement for independent candidates, issued a writ of mandamus, declaring:

> This Court had no power to prescribe the number of voters for independent nominations. But, having held that the statutes which require an excessive number of signatures to an independent candidate are unconstitutional and void, we must go back to the last law on the subject which, in our opinion, complies with the requirements of the Constitution. 99 N.E. at 573.

It is for this reason that this case should not be deemed moot. Although this Court is no longer able to give appellant the precise relief he seeks—ordering his name on the ballot for the November 5, 1968 election—the fundamental constitutional issues raised here remain undetermined. Thus the case differs from *Love v. Griffith*, 266 U. S. 32 (1924), where the court took pains to emphasize that the rule under constitutional attack was for a single election only, which election had passed. Here there is the continuity lacking in *Love*. The judgment of this Court is sought on the constitutionality of a statute which is still being enforced and which will surely give rise to renewed controversy, unless resolved now. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 309 (1897).

Where interests of a public character are involved under conditions that may immediately be repeated, thus giving the litigation a continuing character, the mere fact that the particular subject matter of the instant case has expired does not render the case moot. *Boggess v. Berry Corporation*, 233 F. 2d 389, 391 (9th C.A., 1956); *Meyers v. Jay Street Connecting Railroad*, 288 F. 2d 356, 359 (2nd C.A., 1961). Cf. *Carroll v. Commissioners of Princess Anne*, ____ U. S. ____, 21 L. ed. 2d 325 (November 19, 1968).

Election cases have frequently been considered on appeal though the immediate election has been held. 132 ALR 1185, 1190, with copious citations. A case closely in point is *Carroll v. Schneider*, 211 Ark. 538, 201 S.W. 2d 221 (1947). An independent candidate brought a mandamus action asking the Court to order his name to be placed on the ballot. The Arkansas Supreme Court, which considered the case after the election, said:

> "It is urged, however, that the case is now moot and should be dismissed for that reason. It is moot in the sense that we cannot now afford appellant petitioner any relief but it is not moot in the sense that it is important to decide a practical question of great public interest, which may arise in any future election." 201 S.W. 2d at 224.

A further consideration militating against a holding of mootness is the vital need for guidelines for Legislature and courts. See *Boise City Irr. & Land Co. v. Clark*, 131 F. 415, 419 (9th Cir., 1904); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769 (1952); *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372 (1944).

Having briefed and prepared their cases, the parties here should not be compelled to resort to new litigation and climb the appeal ladder again in order to get an ultimate judicial determination of their conflicting claims. Time limitations characteristically inhere in election cases and where substantial constitutional issues of public interest exist—and persist—which require an authoritative determination for the future guidance of public officers, the mootness doctrine should not be invoked.

CONCLUSION.

The strenuous effort to open the ballot—or reopen the ballot—to disfranchised Ohioans in the face of the worst election laws in the nation was greatly advanced by this Court's holding in *Williams v. Rhodes, supra*, particularly with the resounding endorsement there of the rights of third political parties—including smaller political parties—to share the ballot. Nevertheless—at least insofar as Ohio is concerned—that decision will not provide any relief if Ohio's seven percent statute is permitted to stand. Accordingly, the Court is respectfully urged to

grant this appeal and to unlock a channel of expression now shut off by unconstitutional legislation.

Respectfully submitted,

RALPH RUDD,
Counsel for Appellant.

JERRY GORDON,
BENJAMIN B. SHEERER,
Of Counsel.

APPENDIX.

MEMORANDUM OF OPINION OF THE COURT OF COMMON PLEAS.

(August 22, 1968.)

PERRY B. JACKSON, J.:

This cause, an action seeking the issuance of a writ of mandamus, came on for hearing August 8, 1968.

Relator, Paul M. Brockington, on February 19, 1968, filed nominating petitions for the office of congressman in Ohio's 21st congressional district, with the Cuyahoga County Board of Elections, a named respondent herein. Relator sought to be placed on the November, 1968 ballot as an independent candidate.

On June 26, 1968, the Board of Elections advised relator that his petitions contained 899 valid signatures, and that the number of valid signatures required to be placed on the ballot in the November, 1968, general election was 5,974. (See relator's exhibit X-1.) Relator requested a hearing with the Board of Elections, which was granted. Following said hearing, the Board of Elections affirmed its decision, finding relator's nominating petitions to be insufficient.

On July 10, 1968, relator filed his petition for a writ of mandamus with this court, asking that Ohio Revised Code § 3513.257, which prescribes the requirements of nominating petitions of independent candidates for the office of district representative to congress be held to be unconstitutional and that respondents be ordered to place relator's name on the ballot.

Ohio Revised Code § 3513.257, states in pertinent part:

"The nominating petition of an independent candidate for the office of representative to the general as-

sembly, senator of the general assembly, and district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district."

In an action in mandamus, the relator has the burden of establishing a clear right to the relief sought. He must not only establish that the act which he seeks to compel respondents to perform is one that they are constitutionally bound to perform by virtue of their offices, but also that he, the relator, has a clear right to have the duty enforced.

In the case of *State ex rel. Baker v. Hanefeld, et al.*, 134 Ohio St. 540 (1938), the Court stated that a relator

> "must establish a clear legal right to the extraordinary remedy." 134 Ohio St. 541.

Similarly, in the recent case of *State ex rel. Baines v. Parrino*, 174 Ohio St. 531 (1963), the Court stated

> "It is axiomatic that a clear legal right must be established before a writ of mandamus will issue." 174 Ohio St. 531.

The burden of establishing a clear legal right is on the relator, and if upon all of the evidence presented, relator's clear legal right is not established, the writ must be refused.

This Court finds that the relator has not established by the evidence, his legal right to have a writ of mandamus issue. Therefore, without passing on the merits of the legal issues raised by the respective parties, the Court is of the opinion that a writ of mandamus may not issue in this case.

Writ denied.

JOURNAL ENTRY OF THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT, CUYAHOGA COUNTY, OHIO.

Date: October 1, 1968.

This cause came on to be heard on the appeal on question of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration and a full reading of the entire record, the court finds no error prejudicial to the appellant and finds that the relator-appellant has shown no legal right to the relief requested. Therefore, the judgment of the Common Pleas Court is affirmed and it is ordered that appellees recover of appellant their costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO.

(October 23, 1968.)

This cause here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and no motion to dismiss such appeal having been filed the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
JAN 29 1969
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1969

No. 31

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,

Appellees.

MOTION TO DISMISS OR AFFIRM
On Appeal From the Supreme Court of the State of Ohio.

JOHN T. CORRIGAN,
Prosecuting Attorney of
Cuyahoga County, Ohio,
Criminal Courts Building,
1560 East 21st Street,
Cleveland, Ohio 44114,
Counsel for Appellees,
Joseph A. Cipollone, Director
John J. Carney, Dan W. Duffy,
Robert Hughes, Saul G. Stillman,
Members of the Cuyahoga County
Board of Elections.

JOHN L. DOWLING,
Assistant Prosecuting Attorney,
Of Counsel.

(Other Counsel on inside of cover.)

RALPH RUDD,
c/o American Civil Liberties
Union of Ohio,
Suite 210, 33 Public Square,
Cleveland, Ohio,
Counsel for Appellant.

JERRY GORDON,
BENJAMIN B. SHEARER,
Of Counsel.

WILLIAM B. SAXBE,
Attorney General, State of Ohio,
Office of the Attorney General,
State House Annex,
Columbus, Ohio,
Counsel for Appellees,
James A. Rhodes, Ted W. Brown
and William B. Saxbe.

JULIUS J. NEMETH,
Assistant Attorney General,
Of Counsel.

TABLE OF CONTENTS.

Questions Presented 1

Statement of the Case 2

Substantiality of the Federal Constitutional Questions Involved 4

Conclusion 10

TABLE OF AUTHORITIES.

Cases.

Coffelt v. Bryant, 381 S.W. 2d 731 (1964) 7

Dancy v. Hunt, 294 S.W. 2d (1956) 9

Klein v. Heffernan, 70 N.E. 2d 531, 296 N.Y. 699 7

Moskowitz v. Board of Elections in City of New York, 274 N.Y.S. 2d 93 (1966) 6, 7

Orsini v. Heffernan, 70 N.E. 2d 531, 296 N.Y. 698 7

People, ex rel. Hotchkiss v. Smith, 206 N.Y. 231, 99 N.E. 568 (1912) 5

State ex rel. Meck v. Board of Deputy State Supervisors, 111 Ohio St. 203 3

Williams v. Rhodes, 21 L. ed. 2d 24 (October 15, 1968) 2, 4

Young v. Heffernan, 65 N.Y.S. 2d 423, 187 Misc. 604, affirmed 70 N.E. 2d 411, 296 N.Y. 697 7

Texts.

21 *Ohio Jur.* 2d, Evidence, Sec. 23, p. 42 3

21 *Ohio Jur.* 2d, Evidence, Sec. 56, p. 70 3

Constitution and Statutes.

Constitution of Ohio, Art. IV, Sec. 2 2

Ohio Revised Code:

Sec. 3513.04 8

Sec. 3513.257 ..... 4, 5, 11

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 921.

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,

Appellees.

MOTION TO DISMISS OR AFFIRM

On Appeal From the Supreme Court of the State of Ohio.

QUESTIONS PRESENTED.

The Board of Elections of Cuyahoga County, Ohio, cannot accept Question No. 2 propounded by the appellant for the reason that the appellant did not introduce any evidence at the trial on the subject of the "substantial" or "disruptive" participation of independent candidates in the electoral process of Ohio.

STATEMENT OF THE CASE.

This matter comes before this Court as the conclusion to a litigation journey which had a detour after it began in the U. S. District Court for the Northern District of Ohio, where Paul M. Brockington and others filed a Complaint concerning the same subject on or about April 26, 1968. Ultimately that Complaint was voluntarily dismissed by the plaintiffs on or about June 25, 1968.

Subsequently, Paul M. Brockington chose not to take advantage of his constitutional right to invoke the original jurisdiction of the Supreme Court of Ohio (Art. IV, Sec. 2 of the Ohio Constitution) in mandamus and filed his petition in the Common Pleas Court of Cuyahoga County on July 10, 1968. Brockington also chose not to file in the U. S. District Court for the Southern District of Ohio, despite the fact that such action was taken by the Socialist Labor Party in its case, in which it was represented by the same counsel as Brockington. The Socialist Labor Party enjoyed a direct appeal to this Court, *Williams v. Rhodes*, 21 L. ed. 2d 24, and Brockington could have had a direct appeal to this Court before the election of November 5, 1968. In view of the fact that a constitutional question is alleged and Brockington apparently designed this case for decision ultimately by this Court, his voluntary detour through the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio is inexplicable, but weighs heavily against him on the question of mootness. His own want of diligence made the case moot.

In further response to the Statement of the Case by the appellant, it may be observed that the appellant (hereinafter referred to as Brockington) is improperly seeking to have the court take judicial notice of Ohio Election Statistics, a matter which was not introduced by testimony

or stipulation and thus was not in the evidence submitted to the trial court *during the trial* of this action. It is not enough for Brockington to have injected statistics into his legal argument in his trial brief. A volume which was gratuitously filed by the appellant with the Court of Appeals is not a part of the record in the trial court and was not entitled to judicial notice by the Supreme Court of Ohio or by this Court. The rule is set forth in 21 *Ohio Jur.* 2d, Evidence, Sec. 56, p. 70, the last paragraph of which states as follows:

> "A reviewing court is confined to the record and may not know judicially anything not appearing therein, at least as to those matters which the lower court was not *required* to judicially notice." (Emphasis ours.)

Brockington has cited in his brief (p. 5) the case of *State ex rel. Meck v. Board of Deputy State Supervisors,* 111 Ohio St. 203, a 1924 case. It is important to note two aspects of that case: 1) The statement that the Supreme Court of Ohio *may* take judicial notice of the Secretary of State's election statistics (at p. 210) is obiter dictum, and is not carried into the syllabus of that case; 2) that the *Meck* case was an original action in mandamus in the Supreme Court of Ohio and did not come up to that court on appeal.

As to the permissive use of judicial notice by a trial court rather than a court of appeals, the rule is stated in 21 *Ohio Jur.* 2d, Evidence, Sec. 23, p. 42, as follows:

> "DISCRETION OF COURT.—Among the matters of which the courts will take judicial notice there is one class of which a court is bound to take judicial notice, and another class of which it may, in its discretion, take notice. The courts are bound to take judicial notice of the public statutes and the general laws of

the forum and of the statutes of every state, territory, and other jurisdiction of the United States. With respect to all matters of fact, however, the rule as to judicial notice is based upon an essentially different principle. Of such matters the court may, in a proper case, take judicial notice, but it is not generally bound to do so. This discretion of the court to take judicial notice of matters of common or universal knowledge should be exercised with caution.

"The range of facts of which the courts may, in their discretion, take judicial notice, is extensive. Thus, it has been said that courts will take judicial notice of the general customs and usages of merchants, the notary's seal, things which must happen according to the laws of nature, the coincidences of the days of the week with those of the month, the meaning of words in the vernacular language, the customary abbreviations of Christian names, and the like. Indeed, the field of matters of which the courts take judicial notice is constantly broadening."

SUBSTANTIALITY OF THE FEDERAL CONSTITUTIONAL QUESTIONS INVOLVED.

The Socialist Labor Party case, *Williams v. Rhodes*, 21 L. ed. 2d 24 (October 15, 1968), *did not* hold that Ohio election laws setting requirements for independents are unduly restrictive and are unconstitutional and did not render the seven per cent requirement void.

This Court did not even have before it the question of the constitutionality of R.C. 3513.257. Anything that appears in the *opinions* in that case on the subject of independent candidates is obiter dictum. It is highly significant that Brockington fails to call to the attention of this Court anything in the Journal Entry or order of the United States District Court in the Socialist Labor Party case making any order in regard to independent candidates, other than to provide a space for write-in votes.

Brockington has failed to present *evidence* to show that R.C. 3513.257 is unnecessary or unreasonable, and has failed to cite any authority requiring a holding that the statute is unconstitutional.

Throughout this case, Brockington has adopted the approach of attempting to cast the burden of proof upon the respondents-appellees (appellant's brief, p. 10). No authority is cited for transferring the burden of proof. Brockington offered nothing in the way of proof in the trial court in an effort to show that the enactment of R.C. 3513.257 was unnecessary or unreasonable. As heretofore noted, some statistics were argued by means of injection into the Brockington trial brief. Not only was there no duty on the part of the trial court to take judicial notice of the statistics, but the record fails to disclose that judicial notice was actually accorded. This could have been cleared up by findings of fact and conclusions of law, but Brockington did not seek same.

Counsel for Brockington admitted in oral argument in the trial court that no Federal Court has made a decision declaring a statute unconstitutional in any situation closely resembling the factual matters before this Court.

Counsel for Brockington, being challenged in oral argument in the trial court to name even one case in which a State Court had declared a similar statute unconstitutional, attempted to revert solely to the case of *People, ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 99 N.E. 568 (1912), cited at page 11 of the Brockington brief. There is not the faintest resemblance between the statute which the court struck down in that case and the statute which is now up for consideration before this Court, namely Ohio Revised Code Section 3513.257. The actual rationale of the court becomes apparent upon a full reading of the *Hotchkiss* case and it is no authority in the present case. The *Hotchkiss* court at page 572 of the N.E. Report said:

"In the county of Putnam the average total vote at general elections is a little over 3,000. In Schuyler and Yates counties it is less than 4,000 in each county, while in Hamilton county the average vote is about 1,200 or at least less than 1,500.

"A statutory provision requiring the signatures of 1,500 or even 1,000 voters to entitle a person to file a certificate for independent nominations is, in view of the total number of voters in some of the counties of the state, manifestly unreasonable as a matter of law, and the unconstitutionality of the requirement is so clear that it does not make necessary any discussion of that question by us."

It is beyond comprehension how Brockington can derive any comfort from the unconstitutionality of a statute which imposed a flat burden of an absolute minimum number of signatures without regard to the number of voters in any particular district. This bears no similarity whatsoever to the Ohio statute, which clearly recognizes the breadth of the base of the electors in any given area by simply imposing a percentage requirement. Thus, in any circumstances in which a would-be independent candidate is required to obtain a greater number of signatures it is simply and only because he has a greater number of electors from whom to choose and, as the court observed in *Moskowitz v. Board of Elections in City of New York*, 274 N.Y.S. 2d 93 (1966), at page 98:

"* * * The legislature obviously considered that signers of a petition for the nomination of a regular party candidate must be enrolled in the party, whereas signers of an independent nominating petition may be voters who are enrolled in any party and also those who are not enrolled. The charge that the statute is unfair and discriminatory has been considered by the courts of this state and the contention has been rejected."

The Court in *Moskowitz* was referring primarily to three New York cases decided on the same day, October 25, 1946: *Young v. Heffernan*, 65 N.Y.S. 2d 423, 187 Misc. 604, affirmed 70 N.E. 2d 411, 296 N.Y. 697; *Orsini v. Heffernan*, 70 N.E. 2d 531, 296 N.Y. 698; and *Klein v. Heffernan*, 70 N.E. 2d 531, 296 N.Y. 699.

In the case of *Young v. Heffernan* in which the court rendered an opinion which was followed in the *Orsini* and *Klein* cases, the Court of Appeals of New York upheld a statute which required an independent to obtain 7% of the signatures of the electors with a maximum of 3,000 signatures in a congressional district. At page 607 of the *Young* decision, the court indicated that any question of parity between an independent group and a political party is *for the legislature and not for the court to determine.*

At this point it should be observed that, so far as counsel for the Board of Elections has been able to determine, no court, Federal or State, has struck down as unconstitutional a statute requiring an independent to obtain the signatures of 7% of the electors of his area or district.

During oral argument in the trial court, counsel for the Board of Elections cited the case of *Coffelt v. Bryant*, 381 S.W. 2d 731 (decided September 14, 1964) in which the Supreme Court of Arkansas upheld a statute which required an independent candidate to file nominating petitions with 15% of the total votes cast for Governor. On the subject of a lesser requirement for a party candidate, the court in *Coffelt v. Bryant* stated very cogently its views as to why an independent candidate may, within the proper and legitimate exercise of discretion by the legislature, be required to furnish considerably more signatures. At page 35, the court said:

> "This may well have been the reasoning of the General Assembly: The regular candidates who run

> for office are required to pay extensive filing fees which are used by the party to defray the expense of holding Primary Elections. In many cases these candidates are faced with strong opponents, and they are required to carry on a time-consuming and expensive campaign. After they have won the election and have become the successful nominees they should not be faced with Independent Candidates who have paid only a $37.50 filing fee and secured a petition with not less than 50 names signed by qualified electors, unless these Independent Candidates can show a public demonstration and demand for their election. If this condition should exist, it would not be too difficult for the Independent Candidate, where there is no vacancy, to secure a petition signed by not less than 15 per cent of the qualified electors at the last election. To permit an Independent Candidate to run for office where there is no vacancy without securing a petition signed by 15 percent of the qualified electors would be unfair and unjust to the regular candidate who had been nominated for office. In addition to being unfair and unjust it could easily be argued that this would amount to a discrimination against the regular nominee."

It is the statutory philosophy of Ohio that a person should not be allowed to alternate indiscriminately between party affiliation and political independence, being an independent candidate. This philosophy is expressed in the second paragraph of Section 3513.04 of the Revised Code, as follows:

> "No person who seeks party nomination for an office or position at a primary election by declaration of candidacy shall be permitted to become a candidate at the following general election for any office by nominating petition or by write-in."

It is true that there is not a specific legal prohibition against an individual who votes in a party primary to pre-

vent him from being an independent candidate in the next following general election. However, when one seeks to have a court grant the high prerogative writ of mandamus, it is not fitting that the seeker thereof be one who blows hot and cold politically and who, it may be said, is neither fish nor fowl when it comes to adhering to the nature of his political persuasion. Brockington admitted in his testimony in the trial court that, while seeking office as an independent, he voted in the Democratic primary in May, 1968.

The Texas case of *Dancy v. Hunt*, 294 S.W. 2d (1956), in the Court of Civil Appeals of Texas dealt with this problem. In that case the independent candidate complied with the statute requiring her to have the signatures of 5% of the electors in the precinct for County Commissioner. The independent candidate had voted in the party primary. The party nominee brought a mandamus action and argued that the independent had a duty to support the nominee of the party in whose primary she had voted. The court refused the writ of mandamus in that case but indicated that had the county judge refused to place the independent candidate on the ballot, such an independent, if she sought a writ of mandamus, would not be coming into court with clean hands. The court noted that although there is no legal obligation, there is a moral obligation for a voter in a primary election to support the nominee of that primary.

Thus, from a number of aspects, it is submitted that the instant case is not one which deserves to be considered as an exception to the general rule against entertaining moot cases. Brockington was grossly improvident in selecting the court of first resort and did not pursue the matter with such diligence as to have the matter considered by this Court before the election in which Brock-

ington purported to be a candidate. Likewise, the General Assembly of Ohio is in session and is reviewing the Ohio election laws. If the legislature's action is not satisfactory to Brockington, he can come back in 1970 as a Congressional candidate and diligently pursue his case by filing in the Supreme Court of Ohio or in the U. S. District Court for the Southern District of Ohio.

CONCLUSION.

Counsel for the Board of Elections believes that the constitutional provisions for majority rule and for the best exercise of the democratic process in this nation envision the principle that a candidate for any office is in fact seeking to be *elected* to that office. If that principle is accepted, the strong trend of philosophy running through the reported cases in this area shows that a candidate for public office should be required to show some marked demonstration of public support, inasmuch as a candidate can win only with a majority, in cases where there are two candidates, or a plurality, in which there are three or more. It is not unreasonable for an independent candidate to show that he has the support of 7% or more of his fellow citizens in the area in which he seeks office. If a candidate and his friends and supporters are unwilling, or unable, to obtain the signatures of such a small fraction of the electorate (having full lance at Democratic, Republican, and nondeclared voters) his prospects for election would be minuscule. Viewed as an exercise in the expression of dissent or as an opportunity for manifestation of free speech, a candidate does not logically complain in this regard because every actual or potential voter who is approached for the purpose of obtaining his signature on a nominating petition becomes a sounding board

for the expression of the would-be candidate's political philosophy.

On the evidence before it in this case (and it is once again submitted that no manner of presentation or attachment of exhibits in a brief constitutes evidence to be considered by the court) and on the authorities cited above, this Court should dismiss the appeal and reject the attack on the constitutionality of Section 3513.257 of the Revised Code of Ohio; or, in the alternative, the judgment of the Supreme Court of Ohio upholding the prior Judgment of the Court of Appeals of Cuyahoga County should be affirmed.

Respectfully submitted,

JOHN T. CORRIGAN,

Prosecuting Attorney of Cuyahoga County, Ohio,

By JOHN L. DOWLING,

Assistant Prosecuting Attorney,

Attorneys for Appellees Joseph A. Cipollone, John J. Carney, Dan W. Duffy, Robert E. Hughes and Saul G. Stillman.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 4 1969
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No.... [redacted] 31

STATE OF OHIO ex. rel. PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY,
ROBERT HUGHES, SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

MOTION TO DISMISS

PAUL W. BROWN
Attorney General

CHARLES S. LOPEMAN
First Assistant Attorney General

JULIUS J. NEMETH
Assistant Attorney General
State House Annex
Columbus, Ohio 43215

Attorneys for Appellees
James A. Rhodes, Ted W. Brown
and William B. Saxbe.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	4
CONCLUSION	5
APPENDIX	

TABLE OF AUTHORITIES

Page

Cases

Glen A. Williams, et al. v. *James A. Rhodes, et al.*, No. 543, October Term, 1968, U.S. Supreme Court .. 5

Statutes

Section 3513.05, Revised Code .....2, 4, Appendix

Section 3513.257, Revised Code 2, 4, 5

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

No......

STATE OF OHIO ex. rel. PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY,
ROBERT HUGHES, SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

MOTION TO DISMISS

Appellees James A. Rhodes, Governor of the State of Ohio, Ted W. Brown, Secretary of State of Ohio, and Paul W. Brown, Attorney General of Ohio, pursuant to Rule 16 (1) of the Revised Rules of the Supreme Court of the United States, move this Court to dismiss this appeal on the ground that it does not present a substantial federal question.

STATEMENT OF THE CASE

On July 10, 1968, Appellant Paul W. Brockington filed a petition in mandamus in the Common Pleas Court of Cuyahoga County, Ohio. He named Governor James A. Rhodes, Secretary of State Ted W. Brown, Attorney Gen-

eral William B. Saxbe, and the Members and Director of the Cuyahoga County Board of Elections as Respondents in the action, in their representative capacities.

Appellant's petition stated that he was an independent candidate in the November 5, 1968, election for the United States House of Representatives from Ohio's 21st Congressional District. On or about February 19, 1968, he filed nominating petitions bearing 899 valid signatures with the Board of Elections pursuant to Section 3513.05, Revised Code. (Appendix, pp. 1a-6a).

The nominating petitions were rejected by the Board of Elections because the number of valid signatures contained in them were not sufficient in light of Section 3513.257, Revised Code. (Jurisdictional Statement, pp. 3-4)

Appellant was informed of the rejection by a letter dated June 26, 1968. After a hearing, the Board reaffirmed its decision.

Appellant's petition stated his claim in this case as follows, in paragraph 12 of his petition:

> "Relator says that the said seven percent requirement is unreasonably high and excessive, that it is disproportionate when compared to the 100 signatures required for party candidates, that it is arbitrary and capricious, that it constitutes an invidious discrimination without any relationship to constitutionality justified ends, that its effect is to disfranchise relator and other independent voters, and that it is therefore unconstitutional and void."

The relief requested in the Common Pleas Court was that the Court order the Board of Elections to certify the sufficiency of Appellant's nominating petition and to place his name on the ballot as a qualified independent candidate for the United States House of Representatives from Ohio's 21st Congressional District, and that the Court order all Appellees herein to do all things necessary to place Ap-

pellant's name on the ballot as an independent candidate, or show cause why they should not be required to do so.

The Respondent Board of Elections demurred to the petition, asserting that no cause of action in mandamus was stated. The Respondents Rhodes, Brown and Saxbe, appearing specially, filed a motion to quash. The demurrer and the motion were overruled on July 30, 1968, and answers were duly filed.

The hearing on the merits was held in the Common Pleas Court on August 6, 1968, the Court noting the continuing objection of Appellees Rhodes, Brown and Saxbe to its jurisdiction over them.

On August 22, 1968, the Common Pleas Court issued its order denying the requested writ of mandamus, on the ground that Appellant had not shown a clear legal right to the relief requested. Notice of appeal to the Court of Appeals was filed August 27, 1968.

On September 9, 1968, the Court of Appeals heard Appellant's motion to advance and motion for temporary injunction. It denied the motion for temporary injunction.

The Court of Appeals heard the case on the merits on September 27, 1968, and on October 1, 1968, affirmed the judgment of the Common Pleas Court, on the grounds that it found no error prejudicial to Appellant, and that Appellant had not shown a legal right to the relief requested.

On October 2, 1968, Appellant filed his notice of appeal to the Supreme Court of Ohio, alleging the existence of substantial constitutional questions under Amendment XIV of the United States Constitution.

On October 23, 1968, following the submission of briefs and the hearing of oral argument, the Supreme Court of Ohio dismissed Appellant's appeal *sua sponte* "for the reason that no substantial constitutional question exists herein."

ARGUMENT

As is evident from paragraph 12 of his petition, Appellant has, throughout this litigation, asserted the claim that Section 3513.257, *supra*, is unconstitutional because Section 3513.05, *supra*, requires a minimum of only 100 valid signatures on the nominating petition to qualify for a position as a congressional candidate on the primary ballot of a recognized political party in Ohio, while Section 3513.257, *supra*, requires that an independent Congressional candidate submit a nominating petition containing valid signatures of not less than seven percent of the number of electors who voted at the last election for governor.

Appellant has, in effect, attempted to equate the task of becoming a candidate of a political party on its ballot at a primary election with the task of an independent becoming a candidate on the ballot of an ensuing general election. This comparison is invalid because it involves two separate and distinct steps in the electoral process, and it is repeated again in footnote 1 at page 4 of the jurisdictional statement in this appeal. The tasks which may properly be equated are the tasks of becoming an independent candidate at a general election and the task of becoming the candidate of a political party at a general election. When viewed from this standpoint, it is clear that which is more difficult depends on more than the number of signatures on a candidate's nominating petition, including the conditions and circumstances in any given area at a given time. It can be argued that it would seem more difficult, in terms of requiring more time, effort and money, to become a party candidate at a general election by means of participating in a primary than it is to become an independent candidate at a general election by collecting a certain number of signatures on a nominating petition.

Additionally, Appellees point out that the election at which Appellant sought to be a candidate has passed, and the questions presented by his appeal are moot, and need not necessarily be answered at the present time. This is especially so because the Ohio General Assembly is at present conducting a comprehensive review of the election laws of this State, in light of the decision of this Court in *Glen A. Williams, et al. v. James A. Rhodes, et al.* (No. 543, October Term, 1968). Appellant's argument in regard to the effect of Section 3513.257, *supra*, on any future election is therefore, merely conjectural.

Further, Appellees suggest to the Court that Paul M. Brown, who has succeeded to the office of Attorney General of Ohio, be substituted for William B. Saxbe as a party appellee herein.

CONCLUSION

Appellees urge that this Motion to Dismiss be sustained for the reasons heretofore stated.

Respectfully submitted,

PAUL W. BROWN
Attorney General

CHARLES S. LOZEMAN
First Assistant Attorney General

JULIUS J. NEMETH
Assistant Attorney General
State House Annex
Columbus, Ohio 43215

Attorneys for Appellees
James A. Rhodes, Ted W. Brown
and William B. Saxbe,

APPENDIX

Section 3513.05, Ohio Revised Code — Declarations of candidacy; certification of form of ballots on nominations.

Each person desiring to become a candidate for a party nomination or for election to an office or position to be voted for at a primary election shall, not later than four p. m. of the ninetieth day before the day of such primary election, file a declaration of candidacy and petition, and pay the fee required by section 3513.10 of the Revised Code. Such declaration of candidacy, petition, and all part petitions shall be filed at the same time as one instrument.

If the declaration of candidacy declares a candidacy which is to be submitted to electors throughout the entire state, the petition shall be signed by at least one thousand qualified electors who are members of the same political party as the political party of which the candidate is a member, from at least one third of the counties of the state, and such declaration of candidacy and petition shall be filed with the secretary of state; provided that the secretary of state shall not accept or file any such petition appearing on its face to contain the signatures of more than five thousand electors.

If the declaration of candidacy declares a candidacy which is to be submitted only to electors within a district comprised of more than one county but less than all of the counties of the state, the petition shall be signed by at least one hundred qualified electors of such district who are members of the same political party as the political party of which the candidate is a member, or by such electors equal in number to at least five per cent of the number of votes cast for the candidate for governor of the same political party in such district at the next preceding regular state election if such five per cent is less than one hundred,

and such declaration of candidacy and petition shall be filed with the board of elections of that county or part of a county within the district which had a population greater than that of any other county or part of a county within the district according to the last federal decennial census; provided that such board shall not accept or file any such petition appearing on its face to contain the signatures of more than five hundred electors.

If the declaration of candidacy declares a candidacy which is to be submitted only to electors within a county or a congressional district smaller than a county, the petition shall be signed by at least one hundred qualified electors of such county or district who are members of the same political party as the political party of which the candidate is a member, or by such electors equal in number to at least five per cent of the number of votes cast for the candidate for governor of the same political party in such county or district at the next preceding regular state election if such five per cent is less than one hundred, and such declaration of candidacy and petition shall be filed with the board of the county; provided that such board shall not accept or file any such petition appearing on its face to contain the signatures of more than five hundred electors.

If the declaration of candidacy declares a candidacy which is to be submitted only to electors within a subdivision smaller than a county, the petition shall be signed by at least five qualified electors of such subdivision who are members of the same political party as the political party of which the candidate is a member, and such declaration of candidacy and petition shall be filed with the board of the county within which such subdivision is located; or within which the major portion of the population thereof, as ascertained by the next preceding federal census, is located, if the subdivision is situated in more than one

county; provided that such board shall not accept or file any such petition appearing on its face to contain the signatures of more than twenty-five electors. A petition filed with a declaration of candidacy of a candidate for election as a member of the state central committee or the county central committee of a political party shall be signed by five, but not more than twenty-five, qualified electors of the district, county, ward, township, or precinct within which electors may vote for such candidate. The electors signing such petition shall be members of the same political party as the political party of which the candidate is a member. They shall sign such petition in the presence of a notary public or other official authorized to administer oaths, and such official shall certify thereon that each of such signatures was placed thereon in his presence.

Petitions containing signatures of electors of more than one county shall consist of separate petition papers each of which shall contain signatures of electors of only one county. Petitions containing signatures of electors of more than one county shall not thereby be declared invalid. In case petitions containing signatures of electors of more than one county are filed, the board shall determine the county from which the majority of signatures came, and only signatures from this county shall be counted. Signatures from any other county shall be invalid.

Each separate petition paper shall be circulated by one person only, who shall be a member of the same political party as the candidate, and who shall affirm before a person authorized to administer an oath that each of the signatures affixed thereto is the signature of the person whose signature it purports to be, and that each of such signers affixed his signature in the presence of the circulator.

The secretary of state shall promptly transmit to each board such separate petition papers of each petition ac-

companying a declaration of candidacy filed with him as purport to contain signatures of electors of the county of such board. The board of the most populous county of a district shall promptly transmit to each board within such district such separate petition papers of each petition accompanying a declaration of candidacy filed with it as purport to contain signatures of electors of the county of each such board. The board of a county within which the major portion of the population of a subdivision, situated in more than one county, is located, shall promptly transmit to the board of each other county within which a portion of such subdivision is located such separate petition papers of each petition accompanying a declaration of candidacy filed with it as purport to contain signatures of electors of the portion of such subdivision in the county of each such board.

All petition papers so transmitted to a board and all petitions accompanying declarations of candidacy filed with such board shall, under proper regulations, be open to public inspection, until four p. m. of the eighty-fifth day before the day of the next primary election. Each board shall, not later than the eighty-fourth day before the day of such primary election, examine and determine the validity or invalidity of the signatures on the petition papers so transmitted to or filed with it and shall return to the secretary of state all petition papers transmitted to it by the secretary of state, together with its certification of its determination as to the validity or invalidity of signatures thereon, and shall return to each other board all petition papers transmitted to it by such board, together with its certification of its determination as to the validity or invalidity of the signatures thereon. All other matters affecting the validity or invalidity of such petition papers shall be determined by the secretary of state or the board with whom such petition papers were filed.

Protests against the candidacy of any person filing a declaration of candidacy for party nomination or for election to an office or position, as provided in this section, may be filed by any qualified elector who is a member of the same political party as the candidate and who is eligible to vote at the primary election for the candidate whose declaration of candidacy he objects to, or by the controlling committee of such party. Such protest must be in writing, and must be filed not later than four p. m. of the eightieth day before the day of the primary election. Such protest shall be filed with the election officials with whom the declaration of candidacy and petition was filed. Upon the filing of such protest the election officials with whom it is filed shall promptly fix the time for hearing it, and shall forthwith mail notice of the filing of such protest and the time fixed for hearing it to the person whose candidacy is so protested. They shall also forthwith mail notice of the time fixed for such hearing to the person who filed the protest. At the time fixed such election officials shall hear the protest and determine the validity or invalidity of the declaration of candidacy and petition. If they find that such candidate is not an elector of the state, district, county, or political subdivision in which he seeks a party nomination or election to an office or position, or has not fully complied with sections 3513.01 to 3513.32, inclusive, of the Revised Code, his declaration of candidacy and petition shall be determined to be invalid and shall be rejected, otherwise it shall be determined to be valid. Such determination shall be final.

The secretary of state shall, on the seventy-fifth day before the day of a primary election, certify to each board in the state the forms of the official ballots to be used at such primary election, together with the names of the candidates to be printed thereon whose nomination or election

is to be determined by electors throughout the entire state and who filed valid declarations of candidacy and petitions.

The board of the most populous county in a district comprised of more than one county but less than all of the counties of the state shall, on the seventy-fifth day before the day of a primary election, certify to the board of each county in the district the names of the candidates to be printed on the official ballots to be used at such primary election, whose nomination or election is to be determined only by electors within such district and who filed valid declarations of candidacy and petitions.

The board of a county within which the major portion of the population of a subdivision smaller than the county and situated in more than one county is located shall, on the seventy-fifth day before the day of a primary election, certify to the board of each county in which a portion of such subdivision is located the names of the candidates to be printed on the official ballots to be used at such primary election, whose nomination or election is to be determined only by electors within such subdivision and who filed valid declarations of candidacy and petitions.

* HISTORY: 130 v 827, §1. Eff 1-1-64.

In the Supreme Court of the United States

OCTOBER TERM [redacted]

No. [redacted]

STATE OF OHIO ex rel. PAUL M. BROCKINGTON

Appellant

vs.

JAMES A. RHODES, Governor of the State of Ohio
TED W. BROWN, Secretary of State
WILLIAM B. SAXBE, Attorney General of Ohio
JOSEPH A. DEPOLLAINE, Director
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections

Appellees

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS APPEAL

Raleigh Brooks
c/o American Civil Liberties
Union of Ohio
Suite 210, 33 Public Square
Cleveland, Ohio
Counsel for Appellant

Jerry Gorman
Benjamin H. Sheerer
Of Counsel

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 921

STATE OF OHIO *ex rel* PAUL M. BROCKINGTON,

Appellant,

vs

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, IVAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,

Appellees.

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS APPEAL

FOREWORD

The Motions to Dismiss filed by the appellees require this brief answer. Three points need to be made.

I. MISREPRESENTATION OF APPELLANT'S CASE.

Appellees Rhodes, Brown and Saxbe have distorted and misrepresented appellant's cause of action. They try to reduce it to the single claim that the disproportion between the requirements for independents and party candidates is unreasonable. Appellant does so claim, but, from the beginning of this case, he has also insisted that the seven percent requirement is an arbitrary, unreasonable and capricious classification which violates First and Fourteenth Amendment rights.

II. THE IMPORTANCE OF A DECISION BY THIS COURT IN THIS CASE.

In the closing portion of their argument supporting the motion to dismiss, appellees Rhodes, Brown and Saxbe urge that this case should not be reviewed by this Court since "the Ohio General Assembly is at present conducting a comprehensive review of the election laws of this State, in light of the decision of this Court in *Glen A. Williams, et al. v. James A. Rhodes, et al.*" (Appellees' Motion p. 4) The implication is that the seven percent statute under challenge here is being reconsidered by the Ohio Legislature and that the Court's intervention now would be premature or even precipitous.

There is absolutely no evidence that any consideration is being given by the Ohio Legislature (made up exclusively of members of the two major political parties) to reduce this requirement for independent candidates for public office. *Appellees do not advise this Court that a single bill to that effect has been introduced although numerous changes in other election statutes have been proposed.* In fact, Appellee Ted W. Brown, following the Ohio Supreme Court's refusal to consider appellant's appeal, has announced publicly that the seven percent law for independents is still viable in Ohio and will be enforced.

Furthermore, although Appellee Ted W. Brown has conceded that the fifteen percent statute for third political parties was ruled unconstitutional and void in *Williams v. Rhodes*, ___ U. S. ___, 21 L. ed. 2d 24 (October 15, 1968), he has proposed in its stead a new standard of *ten percent*. A bill embodying that proposal has been presented to the Ohio General Assembly. *The ten percent figure is twice as high as the highest percentage of any other State in the country for qualifying new political*

parties. Based on the vote in 1968 it would require a new political party to file in excess of 400,000 valid signatures. In terms of absolute figures required this represents little change from the requirement challenged in *Williams v. Rhodes, supra*. There the Court will recall the requirement was 433,100 signatures. This new proposal flaunts the spirit—if not the letter of this Court's decision in *Williams v. Rhodes*.

Thus what is revealed in Ohio today is a pattern of hard resistance to the effort to democratize Ohio election laws. In their brief filed with this Court in *Williams v. Rhodes*, U. S. , 21 L. ed. 2d 24 (October 15, 1968), appellant Socialist Labor Party sought to underscore the need for judicial guidelines assuring accessibility to the ballot and argued:

> The tyranny of the majority is not dead in Ohio. When the Ohio General Assembly convenes in January of 1969, there is every reason to believe that in the absence of judicial restraints it will do its utmost to preserve two party control, unhampered by the "problem" of competing third parties. Instead of the 15% requirement, it will consider a 12% or 9% requirement. Instead of a new political party having to file a half million valid signatures to qualify for the ballot, $^2/_5$ of a million or a $^1/_3$ of a million will perhaps "suffice." The results, of course, would be equally prohibitory. These appellants would still be barred from the ballot. New lawsuits would be filed and the same arguments voiced. The uncertainty as to what is "reasonable" would persist. Voting rights and candidates' rights would again be held in abeyance (or inanimate suspension) pending a new round of hearings and appeals. The litigation (or relitigation) process would be a protracted one.
>
> To obviate this occurrence, the Court is again respectfully urged to frame standards which limit

the qualifications States may impose on third political parties.

"We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future* * * *." (Emphasis added) *Louisiana v. United States*, 380 U. S. 145, 154 (1965).

We take small comfort in the fact that our prophecy in the previous litigation appears to have been correct. The goal of freeing the electoral process in Ohio remains unattained unless this Court shall act now.

This case has been publicized in Ohio. The members of the legislature know that the seven percent statute is now before this Court for decision. A letter from the American Civil Liberties Union of Ohio to each legislator included reference to the present state of this litigation. Unfortunately, the possibility that the Ohio legislature will voluntarily lower the bar for independents in absence of action by this Court, especially after the decision of the Ohio Supreme Court below, is so remote as to be virtually non-existent.

Appellant has a right now to a decision as to whether a law—*which the chief election officer of this state says is still being enforced*—complies with constitutional imperatives in the First and Fourteenth Amendments. The appeal here should not be dismissed on the conjectural ground that the legislature *might* amend the seventh percent statute in the absence of any evidence indicating this to be a realistic possibility.

Appellant emphasizes that the critical factor in the instant case is the *7 percent law for independents, not the 15 percent requirements for new political parties. But in tandem these provisions drove both independents and*

third political parties off the ballot in Ohio. The 15 percent requirement was the law in Ohio for decades during which independents and third parties qualified for the Ohio ballot by securing signatures *based on the one percent standard for independents.*

It was only in 1952 when the legislature scaled the requirement for independents to seven percent and excluded the presidential office from those that could be sought as an "independent" that the old fifteen percent statute for political parties acquired prominence.[1] For these reasons this case has potentially greater meaning with regard to the opening of the Ohio ballot to independents and third parties than the previous litigation.

III. THE UNDISPUTED FACTUAL CONTEXT OF APPELLANT'S CONSTITUTIONAL CLAIMS.

Finally, we want to stress that neither of the motions filed by the appellees deny:

(1) The accuracy of the facts and figures proving the almost total absence of independents on the Ohio ballot in the decade prior to 1952 when the requirement was still one percent, and

(2) That the increase to seven percent created an arbitrary, unreasonable and capricious classification.

[1] In 1948 for example, Henry A. Wallace's Progressive Party qualified a slate of presidential electors for the Ohio ballot by obtaining one percent signatures under the provision of the law for independents Section 4785-91, Ohio General Code. *State ex rel. Beck v. Hummel,* 150 Ohio St. 127, 80 N.E.2d 899 (1948). The same was true of the Socialist Labor Party in 1946 with regard to its gubernatorial candidates.

CONCLUSION.

Appellant fears that unless this Court shall provide relief here, he and numberless other Ohioans will be disfranchised for two and perhaps four more years. New and protracted litigation alone may provide relief for these ostracized electors.

Mr. Justice Harlan in his concurring opinion in *Williams v. Rhodes*, *supra*, commented on the 15% provision. After pointing out that the Court's opinion afforded the Socialist Labor Party with declaratory relief from that requirement, he went on to say:

> In my view, this requirement, even when regarded in isolation must fall. As my Brother Black's opinion suggests, the only legitimate interest the State may invoke in defense of this barrier to third-party candidacies is the fear that, without such a barrier, candidacies will proliferate in such numbers as to create a substantial risk of voter confusion. Ohio's requirement cannot be said to be reasonably related to this interest. * * * As both Ohio's electoral history and the actions taken by the overwhelming majority of other States suggests, opening the ballot to this extent is perfectly consistent with the effective functioning of the electoral process. In sum, I think that that Ohio has fallen far short of showing the compelling state interest necessary to overcome this otherwise protected right of political association.

His language is equally fitting to the seven percent requirement.

Respectfully submitted,

RALPH RUBB,
Counsel for Appellant.

JERRY GORDON,
BENJAMIN B. SHEERER,
Of Counsel.

SUPREME COURT, U. S.

FILED

APR 17 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 31

PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF APPELLANT.

RALPH RUDD,
c/o American Civil Liberties Union of Ohio,
33 Public Square,
Cleveland, Ohio,
Attorney for Appellant.

JERRY GORDON,
BENJAMIN B. SHEERER,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Opinions in the Courts Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved .. 2

Questions Presented for Review 3

Statement of the Case 4

Part I. The Particular Facts of Appellant's Case 4

Part II—The Historical Context in Which This Case Arises 6

Argument 12

I. The Seven Percent Statute in Issue Here, Section 3513.257 of the Ohio Revised Code, Has Already Been Held Unconstitutional and Void by This Court in Williams v. Rhodes, 393 U.S. 23 (1968) 12

II. The Seven Percent Statute Abridges Fundamental Rights. These Rights Are Protected Against Abridgement by the States by the First and Fourteenth Amendments 13

A. The Fundamental Rights Abridged Here 13

1. The Right to Cast an Effective Ballot 13

2. The First Amendment Rights Abridged Here 15

a. The Right of Free Association 15

b. The Right of Free Speech 16

B. The Protection Extended by the Due Process Clause of the Fourteenth Amendment 18

III. The Seven Percent Statute Also Denies Appellant the Equal Protection of the Laws Guaranteed by the Fourteenth Amendment 20

A. It Creates an Arbitrary and Capricious Classification, Invidiously Discriminatory Against the Appellant ---- 20

B. The Seven Percent Requirement Is Invidiously Discriminatory Against Appellant and Denies Him Equal Protection of Law Because It Imposes an Unreasonably Difficult Obstacle to His Becoming an Independent Candidate for Office Compared to the Ease With Which a Political Party Candidate Gains Access to the Ballot ---- 22

IV. This Case Should Not Be Regarded As Moot ---- 24

A. The Relief Requested By the Appellant Was Clearly Proper ---- 24

B. The Subject Matter of This Case Is of Continuing Public Interest ---- 25

C. There Is a Critical Need for This Court to Act Now to Establish Guidelines for the Legislature and Courts ---- 25

D. The Appellant Deserves Relief From This Court ---- 26

Conclusion ---- 27

APPENDIX (Attached):

1. Tabulation of Vote Cast in Ohio for President, Governor and Secretary of State at the Presidential and State Elections from 1802 to 1966, Inclusive ---- 1a

2. Letter of July 30, 1968, Ohio Secretary of State to Counsel and Tabulation of All Candidates for U. S. Congress Who Ran as Independent, Socialist or Communist Since 1930 from Ohio Districts ---- 13a

3. Letter, March 17, 1969, Ohio Secretary of State to Counsel and Tabulation of District Vote for Representatives to Congress, General Election, November 5, 1968 ..... 21a

4. Official Democratic Primary Ballot 33a

5. Ohio Statutes 35a

TABLE OF AUTHORITIES.

Cases.

Associated Press v. United States, 326 U.S. 1 (1944) 17

Avery v. Midland County, 390 U. S. 474 (1968) 15

Bates v. Little Rock, 361 U. S. 516 (1960) 15

Bd. of Elections for Franklin County v. State, ex rel. Schneider, 128 Ohio St. 273, 191 N.E. 115 (1934) 24

Boggers v. Berry Corporation, 233 F. 2d 389 (9th Cir. 1956) 25

Bond v. Floyd, 385 U.S. 116 (1966) 18

Bridges v. California, 314 U.S. 252 (1941) 18

Carrington v. Rash, 380 U.S. 89 (1965) 13

Carroll v. Commissioners of Princess Anne, ... U.S. ....., 21 L.ed. 2d 325 (November 19, 1968) .. 25

Carroll v. Schneider, 211 Ark. 538, 201 S.W. 2d 221 (1947) 25

Douglas v. California, 372 U.S. 353 (1963) 23-24

Edwards v. South Carolina, 372 U.S. 229 (1963) 18

Garrison v. Louisiana, 379 U.S. 64 (1964) 17, 18

Gideon v. Wainwright, 372 U.S. 335 (1963) 24

Gomillion v. Lightfoot, 364 U. S. 339 (1960) 14, 15

Griffin v. Illinois, 351 U.S. 12 (1956) ---------- 24

Guinn v. United States, 238 U. S. 347 (1915) ---- 14

Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150 (1897) ---------- 22

Harman v. Forssenius, 380 U. S. 528 (1965) ---- 15

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) ---------- 21, 23

Katzenbach v. Morgan, 384 U.S. 641 (1966) ---- 14

Lane v. Wilson, 307 U. S. 268 (1939) ---------- 14

Meck v. Board of Deputy State Supervisors, 111 Ohio St. 203, 145 N.E. 28 (1924) ---------- 8

Meyers v. Jay Street Connecting Railroad, 288 F. 2d 356 (2nd Cir. 1961) ---------- 25

NAACP v. Alabama, 357 U. S. 449 (1958) ------- 15

NAACP v. Button, 371 U. S. 415 (1963) ---- 15, 18, 23

New York Times v. Sullivan, 376 U. S. 254 (1964) -- 16, 18

Nixon v. Condon, 286 U. S. 73 (1932) ---------- 15

Nixon v. Herndon, 273 U. S. 536 (1927) ---------- 15

Palko v. Connecticut, 302 U.S. 319 (1937) ------- 17

People ex rel. Hotchkiss v. Smith, 206 N.Y. 231, 99 N.E. 568 (1912) ---------- 24

Reynolds v. Sims, 377 U.S. 533 (1964) ---------- 14, 15

Roth v. United States, 354 U.S. 476 (1957) ------- 18

Schneider v. State, 308 U.S. 147 (1939) ---------- 21

Skinner v. Oklahoma, 316 U.S. 535 (1942) ------- 22

Smith v. Allwright, 321 U.S. 649 (1944) ------- 14

Socialist Labor Party v. Rhodes, 290 F.Supp. 983 (1968) ---------- 6, 10, 11, 12, 15, 20-21

State ex rel. Beck v. Hummel, 150 Ohio St. 127, 80 N.E. 2d 899 (1948) ---------- 10

State v. Junkin, 158 Mich. 88, 122 N.W. 473 (1909) -- 24

State v. O'Leary, 115 P. 204 (Mont. Sup. Ct., 1911) -- 24

State ex rel. Selected Properties v. Gottfried, 163 Ohio St. 469, 127 N.E. 2d 371 (1955) ---------- 20

Stromberg v. California, 28 U. S. 359 (1931) ------ 17

Sweezy v. New Hampshire, 354 U.S. 234 (1957) -- 22

Terminiello v. Chicago, 337 U.S. 1 (1949) ------- 18

Thomas v. Collins, 323 U.S. 516 (1945) ---------- 16

Thornhill v. Alabama, 310 U.S. 88 (1940) ------- 23

United States v. Classic, 313 U. S. 299 (1941) ------ 15

United States ex rel. Hoffman v. Quincy, 4 Wall. (U.S.) 535, 18 L.ed. 403 (1867) ---------- 24

United States v. Saylor, 322 U. S. 385 (1944) ------ 15

Wesberry v. Sanders, 376 U. S. 1 (1964) -------- 15

Williams v. Rhodes, 393 U.S. 23 (1968) ---------- ----------2, 3, 6, 8, 12, 13, 15, 16, 18, 21, 26

Yick Wo v. Hopkins, 118 U.S. 356 (1886) ------13, 21

Constitutions.

Constitution of the United States:

Amendment I ----------2, 5, 13, 15

Amendment XIV ----------2, 5, 13, 16, 20, 23

Amendment XV ---------- 14

Amendment XVII ---------- 14

Amendment XIX ---------- 14

Amendment XXIV ---------- 14

Statutes.

Ohio General Code:

Sec. 4785-61 8

Sec. 4785-91 ..... 4, 7, 35a, 36a

Sec. 4999 7

89 Ohio Laws 434, Section 7 ..... 7, 35a

Ohio Revised Code:

Sec. 111.12 8

Sec. 2731.01 20

Sec. 2731.02 20

Sec. 3513.05 ..... 22, 23, 37a

Sec. 3513.257 ..... 2, 5, 7, 12, 20, 36a

Sec. 3513.258 ..... 7, 36a

Sec. 3517.01 ..... 8, 38a

Ohio Revised Statute 2966-20 7

28 U.S.C. 1257 2

28 U.S.C. 2101 2

28 U.S.C. 2111 8

42 U.S.C. 1973 14

Other.

132 ALR 1185, 1190 25

MEIKLEJOHN, *Political Freedom*, Oxford University Press, New York (1965) 17

Mill, On Liberty 17

35 O. Jur. 2d *Mandamus* § 48, p. 300 20

In the Supreme Court of the United States

No. 921.

OCTOBER TERM, 1968.

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,

Relator,

vs.

JAMES A. RHODES, *et al.*,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF OF APPELLANT.

OPINIONS IN THE COURTS BELOW.

Neither the Supreme Court of Ohio nor the Court of Appeals for the Eighth Judicial District of Ohio issued an opinion. A copy of the Journal Entry filed in each court is set forth in the Appendix. (A. 29, 31)

The opinion of the Court of Common Pleas of Cuyahoga County, Ohio has not been published. It is set forth in the Appendix. (A. 25-27)

JURISDICTION.

The appellant filed this appeal to seek review of the judgment of the Ohio Supreme Court entered on October 23, 1968 dismissing appellant's appeal. Appellant claims that his rights were violated contrary to the First and Fourteenth Amendments to the Constitution of the United States. Notice of appeal was filed with the Ohio Supreme Court on January 6, 1969.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1257 and 2101. The Court's jurisdiction is sustained by *Williams v. Rhodes*, 393 U.S. 23 (1968).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

Amendment I:

> Congress shall make no law * * * abridging the freedom of speech * * *

Amendment XIV:

> * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code.

Section 3513.257:

> The nominating petition of an independent candidate for the office of representative to the general assembly, senator of the general assembly, and district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district. The nominating petition of independent candidates for the office of judge of the court of appeals shall be signed by qualified electors not less in number than seven per cent of the number of electors who voted for governor at the next preceding regular state election in the territory over which such court has juris-

diction, or twenty-five hundred electors, whichever is the lesser number.

No such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum aggregate number of signatures required by this section. If the district consists of more than one county, such petition shall contain the signatures of at least fifty electors from each of at least one-half of the several counties of such district. Such petition shall be filed with the board of elections of that county or part of a county within the district which had a population greater than that of any other county or part of a county within the district according to the last federal decennial census, not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

(Additional Ohio statutes relevant here are in Appendix 5 to this brief.)

QUESTIONS PRESENTED FOR REVIEW.

1. In view of the holding of this Court in *Williams v. Rhodes*, 393 U.S. 23 (1968), which invalidated those Ohio Election Laws which operated to exclude third parties and independent candidates from Ohio's election process, is not the seven percent statute attacked here already rendered void as unconstitutional?

2. Where the participation of independent candidates in a state's electoral process is neither substantial nor disruptive under a statute requiring independent candidates to file nominating petitions containing signatures equal in number to *one percent* of those who last voted for gover-

nor in the district, can a State constitutionally revoke the one percent statute and impose in its stead a *seven percent* requirement?

3. Can a state constitutionally erect high and virtually insurmountable barriers to keep independent candidates off the ballot while at the same time it permits party candidates to qualify with ease without denying the former equal protection of the laws?

STATEMENT OF THE CASE.

PART I. THE PARTICULAR FACTS OF APPELLANT'S CASE.

Appellant was an independent candidate for the United States House of Representatives from the Twenty-First Congressional District of Ohio in the November, 1968 election. (A. 1, 20, 21; R. 18, 19) To obtain a place on the Ohio ballot he filed nominating petitions proper in all respects save one: his petitions did not contain the number of signatures required by Section 3513.257, Ohio Revised Code. (Hereafter this statute is often called the "seven per cent statute.") (A. 5, 9, 16, 17; R. 10, 11, 12)

That statute requires an independent candidate for Congress to file signatures equal in number to seven per cent of the votes cast for governor in the Congressional District in the last gubernatorial election. In appellant's case this was 5,974 signatures. (A. 5, 9, 16, 17; R. 10, 11, 12)

Appellant submitted 899 valid signatures. (A. 5, 9, 16, 17; R. 10, 11, 12) This would have been sufficient under the previous Ohio law which had been in effect for *over 60 years* and which required independent candidates to file *one* percent in order to qualify for the ballot. (See Section 4785-91, Ohio General Code before amendment in 1952.)

After the Board of Elections of Cuyahoga County refused his petitions, appellant filed suit for a writ of mandamus in the Court of Common Pleas of Cuyahoga County, Ohio. (A. 2 *et seq.*) He asked the Court to hold Section 3513.257, Ohio Revised Code, unconstitutional and void. (A. 5) In his initial pleading he alleged in part:

> 15. Relator says that unless he is duly certified an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District, his fundamental constitutional rights will be abridged, to wit:
>
> * * * * *
>
> b. His right to Equal Protection of the Laws guaranteed by Amendment XIV of the United States Constitution, a right abridged by the seven percent requirement for independent candidates set forth in Section 3513.257 of the Ohio Revised Code.
>
> c. His right to Due Process of Law guaranteed by Amendment XIV of the United States Constitution but vitiated by the imposition of restrictive and repressive electoral legislation designed to prevent independent candidates from seeking political office in Ohio and devised to disfranchise independent voters who are unwilling to vote for the party candidates.
>
> d. His right to free speech as a duly qualified political candidate for office, guaranteed by Amendment I of the United States Constitution. (A. 6, 7)

The case was heard on the merits and at its conclusion the Court of Common Pleas defined the issues as follows:

> There is no question in the Court's mind, I don't think as far as the evidence is concerned, that the Relator, Paul M. Brockington, is qualified as far as the Constitution goes for holding such an office. The question primarily is one whether the legislative provision for seven per cent is properly within the police

powers of the Legislature and whether—what is the effect if the Court determines that this is an unreasonable and exorbitant requirement and what is the Court's duty with respect to the proceedings in mandamus. (A. 24, R. 24)

The Court of Common Pleas denied the writ of mandamus with opinion (A. 25, 26, 27). Appellant's constitutional claims were raised again on appeal as assignments of error. Nevertheless, and despite the fact that the court had before it the decision of the three judge court in *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983 (1968), the Court of Appeals affirmed the Court of Common Pleas without opinion. (A. 29)

Further appeal was duly taken to the Ohio Supreme Court. On October 16, 1968 counsel for the appellant brought this Court's decision in *Williams v. Rhodes*, 393 U.S. 23 (1968), to the attention of that court. Nevertheless, on October 23, 1968, the Ohio Supreme Court dismissed appellant's appeal *sua sponte* "for the reason that no substantial constitutional question exists herein." (A. 31)

PART II—THE HISTORICAL CONTEXT IN WHICH THIS CASE ARISES.

As we pointed out in Part I of this Statement of Facts, for sixty some years the 1% signatures the appellant secured would have been sufficient. But in 1968 the law required him to obtain the staggering total of 5,974 signatures.[1] The following Ohio election history reveals the full significance of this increase and the effect it has had on the whole of the election process in Ohio.

---

[1] In Ohio's 23rd Congressional District the requirement would have been even higher; 10,281 signatures. (This figure is arrived at by computation from official Board of Election statistics. (A. 19, R. 15).)

Historically Ohio's election laws permitted independent candidates for public office to qualify for a position on the ballot by filing nominating petitions containing a prescribed number of signatures of registered and qualified voters. An 1892 statute, 89 Ohio Laws 434, Section 7, set the standard as "one for every one hundred persons who voted at the next preceding general election in the state or such district or division * * *." This one percent requirement remained constant until January 1, 1952.[2] Effective that date, the Ohio Legislature amended Section 4785-91 of the Ohio General Code to compel independents to secure and file valid signatures totalling at least *seven* percent of the number of votes cast for governor in the district in which they sought to run. This seven percent requirement was incorporated into Sections 3513.257 and 3513.258 of the Ohio Revised Code, effective August 20, 1957 and January 1, 1954 respectively.

Ohio's experience under the former one percent statute is particularly instructive. The central fact is that even before 1952 relatively few candidates for political office chose to carry a banner not hoisted by the Democratic or Republican parties.

Many, if not most, of the "independents" aspiring to public office were in fact members of third political parties. They qualified for the ballot under the one percent requirement for independents and were permitted to list their party designation.[3] In this way they circumvented

---

[2] See Ohio Revised Statute 2966-20 in Bates, Ohio Revised Statutes 2nd through 6th editions; Ohio General Code Section 4999; and Ohio General Code Section 4785-91.

[3] A 1930 opinion of the Ohio attorney general, No. 1855, held that only the candidates of recognized political parties in Ohio could legally designate their party affiliation on the ballot. The ruling was ignored. Third party candidates continued to qualify for the ballot and were identified by party, all under the provision of the Code regulating independents.

the prohibitive tests for party recognition established by Section 4785-61 of the General Code and incorporated in Section 3517.01 of the Ohio Revised Code.[4]

During the first three decades of the 20th Century, an average of three independent (i.e., neither Democratic nor Republican) candidates appeared on the ballot vying with representatives of the two major political parties for state and national office in each election.[5]

---

[4] The key requirement of this statute required the members of a new political party to file valid signatures equal in number to at least 15% of the votes cast for governor in the state in the preceding gubernatorial election. The law was declared unconstitutional by this Court in *Williams v. Rhodes*, 393 U.S. 23 (1968).

[5] See Appendix 1 to this brief. The statistics reproduced there are from Ohio Election statistics, which are compiled and issued by Appellee Ted W. Brown as Ohio's Secretary of State. The Appellee members and director of the Cuyahoga County Board of Elections have objected to our use of these statistics. For the following reasons, the objection is not well taken:

a. Ohio law requires the Secretary of State to publish biennially a compilation of the state's election statistics. Section 111.12, Ohio Revised Code.

b. These statistics are subject to judicial notice. *Meck v. Board of Deputy State Supervisors*, 111 Ohio St. 203, 145 N.E. 28, 30 (1924): ["The annual [election] reports published by the Secretary of State * * * are public general information of which the court may take judicial notice."]

c. The accuracy of these statistics has never been questioned. Indeed, the appellee Secretary of State has never questioned their use.

d. The appellees, insistence on asserting technical evidentiary and non-constitutional objections in this Court reveals their unfamiliarity with 28 USC § 2111. Appellees have never claimed prejudice.

e. These statistics have been brought to the attention of each court that has considered the case. A copy of the volume was filed with the trial judge the day before trial. Another copy was given to the Court of Appeals for the convenience of that court and that volume is part of the record certified to this court.

On the Congressional level during the decade of the 1930's, the frequency of independent candidacies is shown as follows:

Year	*Number of independent candidates in Ohio's 25 Congressional Districts*
1930	2
1932	13
1934	(no record available from Secretary of State)
1936	11
1938	1

See Appendix 2 to this brief.[6]

During the 1940's there was a sharp diminution of independent candidates for Congress as well as for state and national office. The decrease is graphically demonstrated by these figures:

Year	*Number of independent candidates in Ohio's 25 Congressional Districts*
1940	1
1942	2
1944	1
1946	2
1948	1[7]
1950	2

On the state level only the Socialist Labor Party's candidate for governor in 1946[8] and a slate of presidential electors pledged to Progressive Party candidate Henry

---

[6] The statistics above and in Appendix 2 to this brief were gleaned from the official records of the appellee Secretary of State (see his letter of July 30, 1968 which is a part of Appendix 2) and filed with the trial and appellate court as appendices to the briefs filed with those courts. See also fn. 5, *supra*.

[7] See fns. 5 and 6, *supra*.

[8] See Appendix 1 to this brief.

Wallace in 1948 [9] appeared on the Ohio ballot in the 1940's to compete with the candidates of the recognized political parties.

This latter event, the Wallace candidacy, was destined to precipitate momentous changes in Ohio's election laws. The 1948 presidential election was exceedingly close in Ohio with President Harry S. Truman capturing the state by a scant 7,107 votes out of a total of 2,898,474 cast for the two major party candidates.[10] Only 37,596 Ohioans pulled the lever for Henry Wallace but the election proved that a third candidate on the ballot, even though lacking appreciable popular support, could decisively influence the outcome of the election. The Ohio legislature's response to the situation was to change several sections of the election code to prevent that possibility from occurring again.

The changes are most cogently described in Judge Kinneary's separate concurring and dissenting opinion in *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983 (S.D. Ohio 1968). He pointed out that:

> During the fifteen year period prior to 1947, participation in the electoral process by independently nominated candidates was neither substantial nor disruptive. Nevertheless in that year the Ohio General Assembly began a series of changes in the election laws which ultimately resulted in the complete elimination of independent and third party voters and candidates from Ohio's political arena.
>
> * * *
>
> Following (the complete elimination of independent candidacies for president) the Ohio General

---

[9] See *State ex rel. Beck v. Hummel*, 150 Ohio St. 127, 80 NE 2d 899 (1948).

[10] See Appendix 1 to this brief.

Assembly raised the percentage requirement for nominating petitions of independent candidates for all other state and national offices from one (1) per cent to seven (7) per cent and required that the petitions be filed (90) days before the primary election rather than sixty (60) days before the general election. 290 F. Supp. at 994.

The results were predictable. *Not a single independent or third party candidate for a statewide or national office appeared on the Ohio ballot subsequent to 1948.*[11] The congressional picture was not too different:

Year	*Number of independent candidates in Ohio's 25 (or 26) Congressional Districts*
1952	1
1954	1
1956	0
1958	0
1960	0
1962	1
1964	0
1966	0
1968	0[12]

It was this virtual total elimination of competition by the two major political parties that led Judge Kinneary to comment: "The 'two party system' is not a cliche in Ohio, but a statutorily enforced fact." *Socialist Labor Party v. Rhodes*, 290 F. Supp. at 995.

---

[11] At least until 1968 when this Court ordered George Wallace's name added to the Ohio presidential ballot. *Williams v. Rhodes, supra.*

[12] For the 1968 statistics see Appendix 3 to this brief which contains a letter and report of the appellee Secretary of State.

ARGUMENT.

I.

THE SEVEN PERCENT STATUTE IN ISSUE HERE, SECTION 3513.257 OF THE OHIO REVISED CODE, HAS ALREADY BEEN HELD UNCONSTITUTIONAL AND VOID BY THIS COURT IN WILLIAMS v. RHODES, 393 US 23 (1968).

Both majority and dissenting opinions of the three judge district court in *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983 (S. D. Ohio 1968) specifically adverted to the increase in the required number of signatures for independent candidates from one to seven percent as one of several changes in Ohio's election laws adopted by the legislature in the aftermath of the Henry Wallace candidacy. 290 F. Supp. at 989, 994.

In affirming that decision with modification, this Court speaking through Mr. Justice Black concluded:

> [H]ere the *totality* of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause. (Emphasis added) *Williams v. Rhodes*, 393 U.S. 23, 34 (1968).

Mr. Justice Harlan, concurring, understood the Court's decision as "striking down Ohio's statutory scheme *in its entirety*." (Emphasis added.) 393 U.S. at 46.

Thus it appears that the issue now before the Court has already been settled by it. Since the seven percent statute for independents was an integral part of Ohio's "statutory scheme" for perpetuating and protecting the two party political monopoly, it was stricken along with Ohio's other repressive election laws in *Williams v. Rhodes, supra.*

If, however, the seven percent statute is not already void, it is clear it cannot withstand constitutional challenge. The following makes this clear.

II.

THE SEVEN PERCENT STATUTE ABRIDGES FUNDAMENTAL RIGHTS. THESE RIGHTS ARE PROTECTED AGAINST ABRIDGMENT BY THE STATES BY THE FIRST AND FOURTEENTH AMENDMENTS.

A. The Fundamental Rights Abridged Here.

This case deals "with matters close to the core of our constitutional system." *Carrington v. Rash*, 380 US 89, 96 (1965). At issue is the exercise of "different, although overlapping" rights, *Williams v. Rhodes*, 393 US 23, 30 (1968). Broadly speaking they are the right to cast an effective ballot and the right to exercise fully the First Amendment rights of free association and speech. In our system of self-government these rights are inextricably related.

1. The Right to Cast an Effective Ballot.

This Court has said the right to vote is "preservative of all rights." *Yick Wo v. Hopkins*, 118 US 356, 370 (1886). Certainly our political direction from our founding as a nation has been toward the freest and fullest exercise of that right that is possible.

We said in our Declaration of Independence that to secure certain blessings:

> * * * Governments are instituted among Men, deriving their just powers from the consent of the governed.

And we began our constitution in this way:

> *We the people* of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, *do ordain and establish this Constitution for the United States of America.* (Emphasis added.)

These ideals and declarations were not fully realized then and are not realized now. But our direction is clear and our progress toward the good unmistakable.

Thus since adopting our constitution, we have provided that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." (Amendment XV, U.S. Constitution.) And we have decided that Senators should be elected directly (Amendment XVII, U.S. Constitution); that women should have equal access to the ballot (Amendment XIX, U.S. Constitution); and that neither the United States nor any state may abridge or deny the vote "by reasons of failure to pay any poll tax or other tax." (Amendment XXIV, U.S. Constitution.)

And the Congress, too, has moved to guarantee these rights. Most recently it has done so in the Voting Rights Act of 1965. (42 USC § 1973). See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Because "the right to vote freely for the candidates of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," *Reynolds v. Sims*, 377 U. S. 533, 555 (1964), this Court has been resolute in protecting that right. It has protected it against "sophisticated as well as simple-minded modes of discrimination," *Lane v. Wilson*; 307 U. S. 268, 275 (1939) observing that "[c]onstitutional rights would be of little value if they could be * * * indirectly denied," *Smith v. Allwright*, 321 U. S. 649, 664 (1944), or "manipulated out of existence," *Gomillion v. Lightfoot*, 364 U. S. 339, 345 (1960).

Thus, the right to vote may not be denied outright through the so-called "grandfather clauses," *Guinn v. United States*, 238 U. S. 347 (1915); *Lane v. Wilson*, 307 U. S. 268 (1939); or through racially restricted primaries,

Nixon v. Herndon, 273 U. S. 536 (1927); *Nixon v. Condon*, 286 U. S. 73 (1932); *Smith v. Allwright*, 321 U. S. 649 (1944). Neither may it be gerrymandered out of existence, *Gomillion v. Lightfoot*, 364 U. S. 339 (1960); burdened by a poll tax, *Harman v. Forssenius*, 380 U. S. 528 (1965); or diluted by malapportioned districts, *Wesberry v. Sanders*, 376 U. S. 1 (1964); *Reynolds v. Sims*, 377 U. S. 533 (1964); *Avery v. Midland County*, 390 U. S. 474 (1968). The integrity and sanctity of the individual ballot is protected against alteration, *United States v. Classic*, 313 U. S. 299 (1941), and dilution by stuffing of the ballot box, *United States v. Saylor*, 322 U. S. 385 (1944).

It has lately been made clear that the states may not deny the opportunity to cast a ballot on a "write in" basis, *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983 (S. D. Ohio 1968) nor may they make it virtually impossible for any party other than the Republican and Democratic parties to qualify for the ballot. *Williams v. Rhodes*, 393 U. S. 23 (1968). Such a denial unconstitutionally burdens "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." 393 U. S. at 30.

This case brings before this Court an abridgment of the right to vote no less serious than any of those above. Ohio has made the ballot the virtually exclusive preserve of the majority parties. Its message and meaning are clear: run as a party candidate or run not at all.

2. The First Amendment Rights Abridged Here.

a. The Right of Free Association.

It is beyond dispute at this date that freedom of association is protected by the First Amendment. *NAACP v. Button*, 371 U. S. 415 (1963); *Bates v. Little Rock*, 361 U. S. 516 (1960); *NAACP v. Alabama*, 357 U. S. 449

(1958). Equally certain is it that this right is included in those rights protected by the Fourteenth Amendment against action by the States. *New York Times v. Sullivan*, 376 U. S. 254 (1964).

In our society primary reasons for association are the advancement of political ideas and the attainment of political goals. Whether this is done through membership in the formal, enduring structure of a political party or through enlistment in the cause of an "independent" candidate, the basic process is the same: united, collective action for political purposes is undertaken.

Whether these campaigns have any chance of success or not is not important. Perhaps to many in his district appellant's campaign would have seemed quixotic. Nevertheless he and his supporters were denied the opportunity to fully participate in our political process.

What Ohio has done here may not seem to be a direct abridgment of associational rights. Yet Ohio has taken from appellant and others no less than the opportunity to contest meaningfully in the political arena *and it is the contest that gives substance to the right to associate*. As this court said while speaking of political parties:

> The right to form a party for the advancement of political goals means little if a party can be kept off the election ballots and thus denied an equal opportunity to win votes. *Williams v. Rhodes*, 393 U. S. 23, 31 (1968).

b. The Right of Free Speech.

"[T]he great, the indispensable democratic freedoms secured by the First Amendment" hold a "preferred place" in our scheme of government. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). This doubtless proceeds from the concept that freedom of thought and speech are "the matrix,

the indispensable condition, of nearly every other form of freedom" *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

This concept rests on the idea that democratic government requires that all points of view must be expressed. It assumes that even error has value since it helps reveal the truth in its full dimension. Its classic statement is in John Stuart Mill's essay *On Liberty*.

Indeed, for some the essential meaning of the First Amendment is that it protects all political thought and expression. MEIKLEJOHN, *Political Freedom*, Oxford University Press, New York (1965). And while the courts have not so limited the reach of the amendment, nevertheless this facet has been emphasized:

> The maintenance of the opportunity for free political discussions to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. *Stromberg v. California*, 28 U. S. 359, 369 (1931).

Therefore, the amendment:

> rests on the assumption that the wildest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *. *Associated Press v. United States*, 326 U.S. 1, 20 (1944)

For these reasons and because "speech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), this Court has been quick to protect the opportunity for the expression of all points of view.

Thus, the high office and purpose of the amendment requires that "unorthodox ideas, controversial ideas, even

ideas hateful to the prevailing climate of opinion" be protected. *Roth v. United States*, 354 U.S. 476, 484 (1957). Even speech that stirs unrest or discontent must be allowed unless a clear and present danger of a substantial evil is shown to be imminent. *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Criticism of official conduct is protected. *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Bridges v. California*, 314 U.S. 252 (1941). In turn officials are protected so that they "be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 136 (1966).

This brief sketch of some of the contours of the First Amendment's protection of speech makes clear the vital loss here. The arena for public discussion of issues and programs has been narrowed. The loss to the public cannot be measured, for discussion suppressed is lost forever.

B. The Protection Extended by the Due Process Clause of the Fourteenth Amendment.

In *Williams v. Rhodes*, 393 U.S. 23 (1968) this Court pointed out that exclusion from the ballot infringed the fundamental rights described above. It then specifically adopted the following test to determine whether such abridgments may survive constitutional challenge:

> "Only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP v. Button*, 371 U.S. 415 at 438 (1963), 393 U.S. at 31.

Applying that test, the Court concluded that:

> The state has here failed to show any "compelling interest" which justifies imposing such heavy burdens on the right to vote and to associate. 393 U.S. at 31.

The same conclusion is appropriate here.

From the beginning of this case appellant has called upon the appellees to offer any explanation or justification they may have for the seven per cent statute in light of Ohio's election history. No justification has ever been offered.

A justification that has occasionally been offered elsewhere is the so-called "bed-sheet" ballot. Of course, Ohio's history shows this would be a "strawman" argument here. And in any event, a plethora of candidates never seems to disturb Ohio's legislators if the candidates are competing in a party primary. In the 21st Congressional District where appellant sought to run last year, there were no fewer than 14 candidates in the Democratic Party primary. (Appendix 4 to this brief).

Lacking, therefore, any answer to the constitutional challenges mounted by the appellant here, the appellees have resorted to niggling, carping types of attack, hoping apparently to obfuscate the issue. Thus, the state appellees have sought to excise one strand of appellant's argument and misrepresent it as our whole case. They did this most recently in their Motion to Dismiss our appeal to this Court. The claim is made there that appellants' whole case rests on the discrepancy between the requirements for party candidates and independent candidates. This brief amply demonstrates that this is only a part of our case.

The appellee members and director of the Board of Elections on the other hand have not come even that close

to meeting the constitutional issues which permeate this case. Their first effort was a demurrer, but even after the Court of Common Pleas overruled it and held that the appellant had stated a cause of action, they refused to meet the issues. Indeed, since then, there has been a round of dreary complaints about where and how appellant filed his action,[13] that appellant had voted in the Democratic primary (even though Ohio law expressly allows this),[14] and about the manner in which Ohio's Election History has been brought to the attention of the courts below.[15]

We hope that finally in this Court the appellees will respond to these issues. Again we challenge them to offer a justification for Section 3513.257, Ohio Revised Code, if any there be.

III.

THE SEVEN PERCENT STATUTE ALSO DENIES APPELLANT THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT.

A. It Creates an Arbitrary and Capricious Classification, Invidiously Discriminatory Against the Appellant.

Ohio elections were conducted for at least 60 years under the one percent standard. The system worked well. Participation by independents in the state's electoral process "was neither substantial nor disruptive." *Social-*

---

[13] Such complaints are groundless. The Ohio Revised Code specifically authorizes actions in mandamus. Section 2731.01, Ohio Revised Code. The jurisdiction to issue the writ is likewise specifically vested in Courts of Common Pleas, Section 2731.02, Ohio Revised Code.

It is well established in Ohio that mandamus is a proper remedy to challenge the constitutionality of a statute. *State ex rel. Selected Properties v. Gottfried*, 163 Ohio St. 469, 127 N.E. 2d 371 (1955). See 35 O. Jur. 2d *Mandamus* § 48, p. 300.

[14] Section 3513.19, Ohio Revised Code.

[15] See footnotes, 5, 6 and 7 *supra*.

ist Labor Party v. Rhodes, supra. The ballot was never unwieldy or overly burdened. Yet the legislature arbitrarily increased the requirement sevenfold. This was done not because the major parties had too many competitors but because they had *one*: Henry Wallace in 1948. Under these circumstances the higher requirement for independents must fall.

In *Schneider v. State*, 308 U.S. 147, 161 (1939) this Court said:

> In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effects of the challenged legislation.

The "effects" of the seven percent legislation are that independent candidates for office in Ohio have been wiped off the state's political map.

The right to vote (which necessarily embraces the companion right to run for office) is a fundamental political right that is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Such a right cannot be circumscribed without showing a "compelling [state] interest" to justify the restriction. *Williams v. Rhodes, supra*. Ohio's one percent statute in itself provided an obstacle to completely free access to the ballot. The experience under that statute is sufficient to prohibit any higher figure being set:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, *classifications which might invade or restrain them must be closely scrutinized and carefully confined*. (Emphasis added.)

Harper v. Virginia State Board of Elections, 383 U.S. 663, 670 (1966). Under the facts of this case, "carefully confined" means a ceiling of no more than the one percent.

Our Constitution protects the right of independents and third party candidates to participate freely in elections and experience proves that their activity adds a healthy ingredient to the nation's political life. *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957). Certainly the involvement of independents cannot be short-circuited by a legislature composed exclusively of representatives of the two major political parties, which acts arbitrarily, capriciously, and repressively. There are, after all, limits to what a legislatively represented majority may do "at the expense of the dignity * * * of a minority." See Justice Jackson's concurring opinion, *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942).

The seven percent classification bears no reasonable relationship to any legitimate legislative purpose. *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1897). It is patently discriminatory against those Ohioans who choose to run for office independently of the recognized political parties. Such persons are denied Equal Protection of Law.

B. The Seven Percent Requirement Is Invidiously Discriminatory Against Appellant and Denies Him Equal Protection of Law Because It Imposes an Unreasonably Difficult Obstacle to His Becoming an Independent Candidate for Office Compared to the Ease With Which a Political Party Candidate Gains Access to the Ballot.

In Ohio a candidate running for Congress in a political party primary qualifies for the ballot by filing *100* valid signatures. Section 3513.05, Ohio Revised Code. Under the seven percent standard appellant needed 5,974 valid signatures. In the 23rd Congressional District he would have needed 10,281 valid signatures to be certified

for the ballot.[16] Thus for each valid signature the party candidate needs, the independent must secure *100*.

The disproportion is as obvious as it is odious. So long as the political aspirant sticks to the party organization, he qualifies for the ballot with ease. Once, however, the candidate chooses the independent route—under the seven percent law—the task of obtaining the required number of signatures for his nominating petition becomes horrendous.[17]

The costs of running as an independent candidate in Ohio, leaving aside the physical difficulty of securing the necessary number of signatures, may well be astronomical. The less affluent candidate, for this reason alone, has been legislatively eliminated as a political competitor. "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter * * * an electoral standard." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966). That is in effect what Ohio has done here. The right to run for office has been taken from the lower-income putative independent candidate because of the unduly burdensome signature gathering requirement imposed by the major political parties. And all of this in spite of the emphatic injunction that the measure of a man's rights should never be determined by the size of his bankroll. *Douglas v.*

---

[16] Since appellant is challenging the constitutionality of a statute he has the unquestioned right to test all of its possible applications and is not limited to the record of the case at bar. *Smith v. California*, 361 U.S. 147, 151 (1959); *Thornhill v. Alabama*, 310 U.S. 88, 97, 98 (1940); *NAACP v. Button*, 371 U.S. 415, 432 (1963). See footnote 1, *supra*.

[17] On a state scale, securing signatures equal to at least seven percent of the last vote cast for governor is prohibitive. An independent candidate for governor in 1966 needed 218,187 valid signatures to get on the ballot. (See Appendix 1 to this brief.) A party candidate running in the primary for state office qualifies with 1,000 names. Section 3513.05, Ohio Revised Code.

California, 372 U.S. 353, 355 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

IV.

THIS CASE SHOULD NOT BE REGARDED AS MOOT.

A. The Relief Requested By the Appellant Was Clearly Proper.

Appellant asked the courts below to hold that the seven per cent statute was invalid and to reinstate the former one per cent requirement. A case directly in point indicates this was proper relief to seek. In *People ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 99 N.E. 568 (1912) the New York Court of Appeals after striking an unreasonably high requirement for independent candidates issued a writ of mandamus declaring:

> This Court had no power to prescribe the number of voters for independent nominations; but, having held that the statutes which require an excessive number of signatures to an independent certificate are unconstitutional and void, we must go back to the first law on the subject which, in our opinion, complies with the requirements of the Constitution. 99 N.E. at 572.

A return to the former law upon a finding that a successor law is unconstitutional is well established practice. *United States ex rel. Hoffman v. Quincy*, 4 Wall. (U.S.) 535, 18 L.ed. 403 (1867); *Bd. of Elections for Franklin County v. State, ex rel. Schneider*, 128 Ohio St. 273, 191 N.E. 115 (1934); *State v. Junkin*, 158 Mich. 88, 122 N.W. 473 (1909); *State v. O'Leary*, 115 P. 204 (Mont. Sup. Ct., 1911).

B. The Subject Matter of This Case Is of Continuing Public Interest.

Where interests of a public character are involved under conditions that may immediately be repeated, thus giving the litigation a continuing character, the mere fact that the particular subject matter of the instant case has expired does not render the case moot. *Boggers v. Berry Corporation*, 233 F. 2d 389, 391 (9th Cir. 1956); *Meyers v. Jay Street Connecting Railroad*, 288 F. 2d 356, 359 (2nd Cir. 1961). *Cf. Carroll v. Commissioners of Princess Anne*, U.S. , 21 L.ed 2d 325 (November 19, 1968).

Election cases have frequently been considered on appeal though the immediate election has been held. 132 ALR 1185, 1190, with copious citations. A case closely in point is *Carroll v. Schneider*, 211 Ark. 538, 201 S.W. 2d 221 (1947). An independent candidate brought a mandamus action asking the Court to order his name to be placed on the ballot. The Arkansas Supreme Court, which considered the case after the election, said:

> It is urged, however, that the case is now moot, and should be dismissed for that reason. It is moot in the sense that we cannot now afford appellant petitioner any relief, but it is not moot in the sense that it is important to decide a practical question of great public interest, which may arise again in any future election. 201 S.W. 2d at 224.

C. There Is a Critical Need for This Court to Act Now to Establish Guidelines for the Legislature and Courts.

At stake here is much more than the constitutionality of Ohio's seven percent statute for independent candidates. Its invalidity leads to the important question: What regulation should take its place?

Ohio's history offers this court the opportunity of setting a ceiling as to what the maximum permissible regulation should be. Based on Ohio's experience any classification in excess of the historically tested one percent is unduly burdensome *on its face*. Yet it is quite possible—indeed probable—that if the seven percent statute is stricken and no ceiling adopted by this Court, the Ohio legislature will adopt a five percent or four percent standard in its stead despite the fact that all arguments advanced here against the seven percent statute would be equally telling against the new regulation. (Thus, despite this court's holding in *Williams v. Rhodes, supra*, Ohio's Secretary of State has proposed a ten percent requirement for new political parties—a figure twice as high as any other state's requirements—and at last report the Ohio Senate Committee on elections is agreed on a seven percent requirement. Yet as this Court noted in *Williams v. Rhodes* at footnote 9 to the majority opinion: "Forty-two states require third parties to obtain the signatures of only 1% or less of the electorate in order to appear on the ballot. It appears that no significant problem has arisen in these states which have relatively lenient requirements for obtaining ballot position.")

For these reasons, appellant respectfully urges this Court to go beyond a mere voiding of the seven per cent statute and to establish the one percent standard as a ceiling.

D. The Appellant Deserves Relief From This Court.

Appellant has vigorously prosecuted his case. The docket entries in the Joint Appendix (A 1, 2, 27, 28, 30, 31) show that he took every step he could to secure the relief he sought. But despite his best efforts, Appellant was continually frustrated in his efforts to vindicate his

constitutional rights. He prays that his frustration will be ended here.

CONCLUSION.

The importance of this case is great. At issue is a matter that has to do with nothing less than the quality of political life in Ohio. The Court can act here to insure that Ohio's election process is open to all points of view and candidates.

In a time such as this when dissent seems often to lead to bloody confrontations and street battles, it is essential that all methods of peaceful, lawful dissent be kept as open as possible. All our citizens must be able to feel that the political process offers them hope of airing and rectifying their grievances. For far too long Ohio has made its political process the exclusive preserve of the two major parties thereby increasing the alienation felt by many of its citizens.

Respectfully submitted,

RALPH RUDD,
JERRY GORDON,
BENJAMIN B. SHEERER,
Attorneys for Appellant.

APPENDIX

APPENDIX 1.

VOTE CAST IN OHIO FOR PRESIDENT, GOVERNOR AND SECRETARY OF STATE AT THE PRESIDENTIAL AND STATE ELECTIONS FROM 1802 TO 1966, INCLUSIVE.

Year Elected	Office	Name of Candidate	Politics	Number of votes each received	Total
1802	Governor	Edward Tiffin	Republican	4,564	4,564
1803*	Secy of State	Wm Creighton Jr	Republican		
1804	President	Thomas Jefferson	Republican	2,593	
		Charles C Pinckney	Federalist	364	
		Scattering		256	3,213
1804	Governor	Edward Tiffin	Republican	4,781	4,781
1806	Governor	Return J Meigs Jr	Federalist	5,550	
		Nathaniel Massie	Republican	4,757	10,307
1808	President	James Madison	Republican	5,645	
		Charles C Pinckney	Federalist	1,174	6,819
1808	Governor	Samuel Huntington	Republican	7,293	
		Thomas Worthington	Republican	5,001	
		Thomas Kirker	Republican	3,997	16,291
1808*	Secy of State	Jeremiah McLene			
1810	Governor	Return J Meigs Jr	Republican	9,924	
		Thomas Worthington	Republican	7,731	17,655
1812	President	James Madison	Republican	7,420	
		DeWitt Clinton	Federalist	4,301	10,721
1812	Governor	Return J Meigs Jr	Federalist	11,859	
		Thomas Scott	Republican	7,903	19,762
1814	Governor	Thomas Worthington	Republican	15,879	
		Othniel Looker	Federalist	6,171	22,050
1816	President	James Monroe	Republican	3,129	
		Rufus King	Federalist	591	3,719
1816	Governor	Thomas Worthington	Republican	22,931	
		James Dunlap	Republican	6,295	
		Ethan A Brown	Federalist	1,607	30,833
1818	Governor	Ethan A Brown	Republican	30,194	
		James Dunlap	Republican	8,025	38,219
1820	President	James Monroe	Democrat	7,164	
		John Q Adams	Opposition	2,215	9,379
1820	Governor	Ethan A Brown	Democrat	34,846	
		Jeremiah Morrow	Democrat	9,424	
		William H Harrison	Democrat	4,340	
		Scattering		250	48,860
1821	Governor	Jeremiah Morrow	Democrat	26,071	
		Allen Trimble	Federalist	22,809	
		William W. Irvin	Democrat	11,060	60,000

* From 1803 to 1850 the Secretary of State was elected by the General Assembly.

† The Democrat party of today claims lineal descent from the first Republican party with President Jefferson as its founder. Authorities differ as to the date when the party dropped the name Republican and assumed that of Democrat, it being ascribed to various dates between 1803 and 1820.

‡ Political parties were disorganized at the time of the election of John Q. Adams. He claimed to be a Republican as Jefferson but his doctrines were decidedly Federalistic. The opposition to his administration took the name of Democrat, and elected Andrew Jackson as President in 1828.

VOTE CAST IN OHIO AT PRESIDENTIAL AND STATE ELECTIONS, ETC.—(Continued)

Year Elected	Office	Name of Candidate	Politics	Number of votes each received	Total
1824	President	Andrew Jackson	Democrat	18,489	
		John Q. Adams	Coalition	12,280	
		Henry Clay	Democrat	19,255	50,024
1824	Governor	Jeremiah Morrow	Democrat	19,526	
		Allen Trimble	N. Republican	17,108	36,634
1826	Governor	Allen Trimble	N. Republican	21,475	
		John Bigger	Democrat	4,114	
		Alex Campbell	Republican	4,765	
		Benjamin Tappan		4,192	
		Scattering		187	34,733
1828	President	Andrew Jackson	Democrat	67,597	
		John Q. Adams	N. Republican	61,396	130,993
1828	Governor	Allen Trimble	N. Republican	53,971	
		John W. Campbell	Democrat	51,951	
		Scattering		112	106,034
1830	Governor	Duncan McArthur	N. Republican	49,668	
		Robert Lucas	Democrat	40,186	
		Scattering		226	90,080
1831*	Sec'y of State	Moses H. Kirby	Whig		
1832	President	Andrew Jackson	Democrat	81,240	
		Henry Clay	N. Republican	76,553	
		William Wirt	Anti Mason	509	158,294
1832	Governor	Robert Lucas	Democrat	71,251	
		Darius Lyman	Whig	65,185	
		Scattering		11	136,447
1834	Governor	Robert Lucas	Democrat	70,758	
		James Findlay	Whig	67,414	
		Scattering		15	138,187
1835*	Sec'y of State	Benjamin Hinkson			
1836	President	Martin Van Buren	Democrat	30,255	
		Wm. H. Harrison	Whig	104,918	
		Scattering		2,137	137,310
1838	Governor	Joseph Vance	Whig	92,206	
		Eli Baldwin	Democrat	86,135	
		Scattering		203	178,362
1840*	Sec'y of State	Carter B. Harlan	Democrat		
1838	Governor	Wilson Shannon	Democrat	101,886	
		Joseph Vance	Whig	102,146	
		Scattering		7	210,039
1840	President	Wm. H. Harrison	Whig	148,157	
		Martin Van Buren	Democrat	124,782	
		James G. Birney	Liberty	809	273,842
1842	Governor	Thomas Corwin	Whig	143,442	
		Wilson Shannon	Democrat	129,813	
		Scattering		8	274,263
1844*	Sec'y of State	William Trevitt	Democrat		
1845*	Sec'y of State	John Shane	Whig		
1842	Governor	Wilson Shannon	Democrat	116,124	
		Thomas Corwin	Whig	117,902	
		Leicter King	Abolitionist	3,114	
		Scattering		40	241,880
1844	President	James K. Polk	Democrat	149,061	
		Henry Clay	Whig	155,113	
		James G. Birney	Liberty	8,050	312,224
1844	Governor	Mordecai Bartley	Whig	146,333	
		David Tod	Democrat	145,062	
		Leister King	Abolitionist	8,808	
		Scattering		11	300,214

VOTE CAST IN OHIO AT PRESIDENTIAL AND STATE ELECTIONS, ETC.—(Continued)

Year Elected	Office	Name of Candidate	Politics	Number of votes each received	Total
1844	Sec'y of State	Samuel Galloway			
1845	Governor	William Bebb	Whig	118,869	
		David Tod	Democrat	116,484	
		Samuel Lewis	Abolitionist	10,797	
		Scattering		46	246,196
1848	President	Zachary Taylor	Whig	138,359	
		Lewis Cass	Democrat	154,775	
		Martin Van Buren	Free Soil	35,342	328,479
1849	Governor	Seabury Ford	Whig	148,736	
		John B. Weller	Democrat	148,465	
		Scattering		742	297,943
1850	Governor	Reuben Wood	Democrat	133,043	
		William Johnston	Whig	121,103	
		Edward Smith	Abolitionist	13,241	267,943
1850	Sec'y of State	Henry W. King			
1851	Governor	Reuben Wood	Democrat	140,033	
		Samuel F. Vinton	Whig	119,548	
		Samuel Lewis	Abolitionist	19,499	
		Scattering		62	282,182
1851	Sec'y of State	William Trevitt	Democrat	145,536	
		Earl Bill	Whig	120,256	
		Henry W. King	Free Soil	15,268	281,060
1852	President	Franklin Pierce	Democrat	168,933	
		Winfield Scott	Whig	152,521	
		John P. Hale	Free Soil	31,732	353,186
1853	Governor	William Medill	Democrat	147,669	
		Nelson Barrere	Whig	85,257	
		Samuel Lewis	Abolitionist	50,146	283,868
1853	Sec'y of State	William Trevitt	Democrat	151,818	
		Nelsoff Van Vorhes	Whig	97,500	
		William Graham	Free Soil	33,518	
		Scattering		409	283,245
1855	Governor	Salmon P. Chase	Republican	146,220	
		William Medill	Democrat	135,818	
		Allen Trimble	American	24,276	302,063
1855	Sec'y of State	James H. Baker	Rep. and Am.	168,124	
		William Trevitt	Democrat	133,641	302,165
1856	President	James Buchanan	Democrat	170,874	
		John C. Fremont	Republican	187,497	
		Millard Fillmore	American	28,126	386,497
1857	Governor	Salmon P. Chase	Republican	160,168	
		H. B. Payne	Democrat	159,065	
		P. Van Trump	American	10,272	329,505
1857	Sec'y of State	Addison P. Russell	Republican	161,857	
		Jacob Reinhard	Democrat	159,421	
		C. L. Allen	American	10,591	
		Scattering		278	331,917
1858	Governor	William Dennison	Republican	184,557	
		Rufus P. Ranney	Democrat	171,226	355,783
1859	Sec'y of State	Addison P. Russell	Republican	184,819	
		Jacob Reinhard	Democrat	170,400	355,219
1860	President	Abraham Lincoln	Republican	231,809	
		Stephen A. Douglas	Ind. Democrat	187,421	
		John Bell	Const. Union	12,194	
		John C. Breckenridge	Democrat	11,405	
		Gerrit Smith	Abolitionist	116	442,945
1861	Governor	David Tod	Republican	288,477	
		Hugh J. Jewett	Democrat	151,794	
		Scattering		103	440,374

VOTE CAST IN OHIO AT PRESIDENTIAL AND STATE ELECTIONS; ETC.—(Continued)

Year Elected	Office	Name of Candidate	Politics	Number of votes each received	Total
1861	Sec'y of State	Benjamin R Cowan	Republican	207,392	
		William W Armstrong	Democrat	151,912	
		Scattering		181	359,445
1862	Sec'y of State	William W Armstrong	Democrat	184,315	
		Wilson S Kennon	Republican	178,755	363,070
1863	Governor	John Brough	Republican	288,374	
		C L Vallandigham	Democrat	187,492	475,866
1864	President	Abraham Lincoln	Republican	265,654	
		George B McClellan	Democrat	205,599	471,253
1864	Sec'y of State	William Henry Smith	Republican	237,210	
		William W Armstrong	Democrat	182,439	419,649
1865	Governor	Jacob D Cox	Republican	223,631	
		George W Morgan	Democrat	193,797	
		Scattering		360	417,790
1866	Sec'y of State	William Henry Smith	Republican	256,302	
		Benjamin Lafevre	Democrat	213,606	469,908
1867	Governor	R B Hayes	Republican	243,605	
		A G Thurman	Democrat	240,622	484,227
1868	President	U S Grant	Republican	280,223	
		Horatio Seymour	Democrat	238,606	518,829
1868	Sec'y of State	Isaac R Sherwood	Republican	267,065	
		Thomas Hubbard	Democrat	249,682	516,747
1869	Governor	R B Hayes	Republican	238,082	
		G H Pendleton	Democrat	228,581	
		Samuel Scott	Prohibition	629	465,292
1870	Sec'y of State	Isaac R Sherwood	Republican	221,709	
		William Heisley	Democrat	205,015	
		Jay Odell	Prohibition	2,863	429,587
1871	Governor	Edward F Noyes	Republican	238,273	
		George W McCook	Democrat	218,105	
		Gideon T Stewart	Prohibition	4,084	460,462
1872	President	U S Grant	Republican	281,852	
		Horace Greeley	Dem and Lib	244,321	
		James Black	Temperance	2,100	
		Charles O'Connor	Democrat	1,163	
		Scattering		162	529,598
1872	Sec'y of State	Allen T Wickoff	Republican	263,910	
		Aquila Wiley	Democrat	251,785	
		F Schumacher	Prohibition	2,045	519,760
1873	Governor	Edward F Noyes	Republican	215,857	
		William Allen	Democrat	214,654	
		Gideon T Stewart	Prohibition	10,378	
		Isaac C Collins		10,109	448,978
1874	Sec'y of State	Allen T Wickoff	Republican	221,204	
		William Bell Jr	Democrat	238,406	
		John R Buchtel	Prohibition	7,815	467,425
1875	Governor	R B Hayes	Republican	297,811	
		William Allen	Democrat	293,279	
		Jay Odell	Prohibition	1,593	
		Scattering		17	592,700
1876	President	R B Hayes	Republican	330,698	
		Samuel J Tilden	Democrat	323,182	
		G Clay Smith	Prohibition	1,636	
		Peter Cooper	Greenback	4,507	
		Scattering		1,188	660,221
1876	Sec'y of State	Milton Barnes	Republican	317,636	
		William Bell Jr	Democrat	311,220	
		E S Chapman	Prohibition	1,863	630,939

VOTE CAST IN OHIO AT PRESIDENTIAL AND STATE ELECTIONS, ETC.—(Continued)

Year Elected	Office	Name of Candidate	Politics	Number of votes each received	Total
1877	Governor	William H. West	Republican	289,105	
		Richard M. Bishop	Democrat	201,625	
		Lewis H. Bond		12,489	
		Stephen Johnson		16,912	
		Henry A. Thompson	Prohibition	4,836	554,967
1878	Secy of State	Milton Barnes	Republican	274,120	
		David R. Page	Democrat	270,966	
		Andrew Roy	Greenback	38,332	
		Jeremiah N. Robinson	Prohibition	5,682	589,100
1879	Governor	Charles Foster	Republican	336,261	
		Thomas Ewing	Democrat	319,132	
		Gideon T. Stewart	Prohibition	4,145	
		A. Sanders Piatt	Greenback	9,072	
		John Hood		547	669,157
1880	President	James A. Garfield	Republican	375,048	
		Winfield S. Hancock	Democrat	340,821	
		James B. Weaver	Greenback	6,456	
		Neal Dow	Prohibition	2,616	
		Scattering		26	724,967
1880	Secy of State	Charles Townsend	Republican	362,021	
		William Lang	Democrat	343,016	
		Charles A. Lloyd	Greenback	6,786	
		William H. Doan	Prohibition	2,815	
		Scattering		1,548	716,186
1881	Governor	Charles Foster	Republican	312,735	
		John W. Bookwalter	Democrat	288,426	
		Abraham R. Ludlow	Prohibition	16,597	
		John Seitz	Greenback	6,350	
		Scattering		138	624,226
1882	Secy of State	Charles Townsend	Republican	297,759	
		James W. Newman	Democrat	316,824	
		F. Schumacher	Prohibition	12,202	
		George L. Hale	Greenback	5,345	
		Scattering		9	632,189
1883	Governor	Joseph B. Foraker	Republican	347,104	
		George Hoadley	Democrat	339,693	
		F. Schumacher	Prohibition	8,362	
		Charles Jenkins	Greenback	2,937	
		Scattering		3,154	721,510
1884	President	James G. Blaine	Republican	400,082	
		Grover Cleveland	Democrat	368,280	
		John P. St. John	Prohibition	11,069	
		Benj. F. Butler	Greenback	5,179	
		Scattering		2,549	787,159
1884	Secy of State	James S. Robinson	Republican	391,597	
		James W. Newman	Democrat	380,353	
		Peter M. Harold	Union Labor	3,699	
		Evan J. Morris	Prohibition	8607	
		Scattering		1,657	786,713
1885	Governor	Joseph B. Foraker	Republican	359,281	
		George Hoadley	Democrat	341,850	
		Adna B. Leonard	Prohibition	28,081	
		John W. Northrop	Greenback	2,001	
		Scattering		2,774	733,967
1886	Secy of State	James S. Robinson	Republican	341,095	
		John McBride	Democrat	329,314	
		Henry B. Smith	Prohibition	28,982	
		Charles Bonsall	Greenback	2,010	
		Scattering		2,832	704,233
1887	Governor	Joseph B. Foraker	Republican	336,334	
		Thomas E. Powell	Democrat	333,203	
		John Seitz	Union Labor	24,711	
		Morris Sharp	Prohibition	29,700	
		Scattering		2,820	746,970

VOTE CAST IN OHIO AT PRESIDENTIAL AND STATE ELECTIONS, ETC.—(Continued)

Year Elected	Office	Name of Candidate	Politics	Number of votes each received	Total
1888	President	Benjamin Harrison	Republican	416,054	
		Grover Cleveland	Democrat	396,455	
		Clinton B. Fiske	Prohibition	24,356	
		Alson J. Streeter	Union Labor	5,429	
		Scattering		1,580	841,941
1885	Sec'y of State	Daniel J. Ryan	Republican	416,510	
		Boston G. Young	Democrat	395,522	
		Walter S. Payne	Prohibition	24,618	
		George F. Ebner	Union Labor	5,452	
		Scattering		1,859	841,941
1889	Governor	Joseph B. Foraker	Republican	368,337	
		James E. Campbell	Democrat	379,424	
		John B. Helwig	Prohibition	25,306	
		John H. Rhodes	Union Labor	1,048	
		Scattering		195	774,721
1890	Sec'y of State	Daniel J. Ryan	Republican	363,545	
		Thaddeus E. Cromley	Democrat	352,379	
		Melanchton C. Lockwood	Prohibition	23,812	
		Ezekiel T. Curtis	Union Labor	3,232	
		Scattering		470	742,180
1891	Governor	William McKinley, Jr.	Republican	386,294	
		James E. Campbell	Democrat	363,228	
		John J. Ashenhurst	Prohibition	30,330	
		John J. Seitz	People's	23,472	
		Scattering		2	795,631
1892	President	Benjamin Harrison	Republican	405,183	
		Grover Cleveland	Democrat	404,115	
		James B. Weaver	People's	16,830	
		John Bidwell	Prohibition	20,062	
		Scattering		11,461	856,651
1892	Sec'y of State	Samuel M. Taylor	Republican	402,540	
		William A. Taylor	Democrat	401,451	
		Solon C. Thayer	People's	14,514	
		George L. Case	Prohibition	25,885	844,430
1893	Governor	William McKinley	Republican	451,847	
		Lawrence T. Neal	Democrat	352,547	
		Gideon P. Macklin	Prohibition	22,406	
		Edward J. Bracken	People's	13,563	
		Scattering		11,241	855,604
1894	Sec'y of State	Samuel M. Taylor	Republican	411,988	
		Milton Turner	Democrat	276,902	
		Mark G. McCaslin	Prohibition	23,237	
		Charles R. Martin	People's	43,633	
		Scattering		1	755,641
1895	Governor	Asa S. Bushnell	Republican	421,141	
		James E. Campbell	Democrat	334,210	
		Jacob S. Coxey	People's	37,623	
		Seth H. Ellis	Prohibition	21,264	
		William Watkins	Socialist Labor	1,867	
		Scattering		1	817,469
1896	President	William McKinley	Republican	525,991	
		William J. Bryan	Democrat	474,882	
		William J. Bryan	People's	7,847	
		Joshua Levering	Prohibition	5,086	
		Charles E. Bentley	National Party	2,716	
		Charles H. Matchett	Socialist Labor	1,165	
		John M. Palmer	National Dem.	1,839	1,014,230
1896	Sec'y of State	Charles Kinney	Republican	523,000	
		Clinton A. White	Democrat	472,462	
		Samuel H. Rockhill	Prohibition	5,468	
		Wesley C. Bates	National Party	3,185	
		Daniel W. Wallace	Socialist Labor	1,244	1,005,359

VOTE CAST IN OHIO AT PRESIDENTIAL AND STATE ELECTIONS, ETC.—(Continued)

Year Elected	Office	Name of candidate	Politics	Number of votes each received	Total
1897	Governor	Asa S. Bushnell	Republican	429,415	
		Horace L. Chapman	Democrat	401,750	
		John C. Holiday	Prohibition	7,555	
		Jacob Sechler Coxey	People's	6,276	
		Julius Dexter	National Dem.	1,592	
		William Watkins	Socialist Labor	4,240	
		Samuel J. Lewis	Negro Protec.	422	
		John Richardson	Liberty	3,125	854,480
1898	Secy of State	Charles Kinney	Republican	406,213	
		Upton K. Guthrey	Democrat	347,074	
		Thomas Brown	Prohibition	7,589	
		John F. Flynn	Socialist Labor	3,793	
		James A. Craft	Union Reform	10,813	775,982
1899	Governor	George K. Nash	Republican	417,149	
		John R. McLean	Democrat	365,170	
		Seth H. Ellis	Union Reform	2,744	
		George M. Hammell	Prohibition	5,825	
		Robert Bandlow	Socialist Labor	2,434	
		Samuel M. Jones		100,721	928,043
1900	President	William McKinley	Republican	543,[illegible]9	
		William J. Bryan	Democrat	474,[illegible]	
		Seth H. Ellis	Union Reform	4,[illegible]34	
		John G. Woolley	Prohibition	10,[illegible]	
		Joseph F. Wallace	Socialist Labor	1,[illegible]55	
		Wharton Barker	People's	[illegible]5	
		Eugene [illegible] Debs	Soc. Dem.	6,347	1,042,[illegible]75
1900	Secy of State	Lewis C. Laylin	Republican	541,552	
		Henry H. McFadden	Democrat	474,078	
		Frank Frankenberg	Union Reform	4,047	
		J. Knox Montgomery	Prohibition	8,983	
		Samuel Barton	Socialist Labor	1,707	
		Louise F. Hemse	Soc. Dem.	6,332	1,035,650
1901	Governor	George K. Nash	Republican	450,042	
		James Kilbourne	Democrat	365,525	
		[illegible]. Pinney	Prohibition	8,978	
		John Richardson	Union Reform	2,718	
		John H. T. Juergens	Socialist Labor	2,944	
		Harry C. Thompson	Socialist	7,552	837,759
1902	Secy of State	Lewis C. Laylin	Republican	450,121	
		Herbert S. Bigelow	Democrat	361,720	
		Andrew L. White	Prohibition	12,333	
		Max S. Hayes	Socialist	14,270	
		Theodore Adams	Socialist Labor	2,981	
		Scattering			841,427
1903	Governor	Myron T. Herrick	Republican	[illegible]0	
		Tom L. Johnson	Democrat	45	
		Nelson D. Creamer	Prohibition	[illegible]93	
		Isaac Cowan	Socialist	23,457	
		John D. Goetze	Socialist Labor	[illegible]75	886,551
1904	President	Theodore Roosevelt	Republican	600,095	
		Alton B. Parker	Democrat	344,674	
		Silas C. Swallow	Prohibition	14,332	
		Eugene V. Debs	Socialist	36,260	
		Charles H. Corregan	Socialist Labor	2,351	
		Thomas E. Watson	People's Party	1,[illegible]42	[illegible]4,[illegible]54
1904	Secy of State	Lewis C. Laylin	Republican	587,595	
		Alfred P. Sandles	Democrat	337,[illegible]74	
		Harold King Rockhill	Prohibition	19,233	
		Alfred J. Swing	Socialist	33,[illegible]43	
		John H. T. Juergens	Social Labor	2,[illegible]	
		John J. Allen	People's Party	1,[illegible]41	981,[illegible]60
1905	Governor	Myron T. Herrick	Republican	450,[illegible]11	
		John M. Pattison	Democrat	417,[illegible]04	
		Isaac Cowan	Socialist	17,[illegible]05	
		Aaron S. Watkins	Prohibition	13,[illegible]01	
		John J. Seitger	Socialist Labor	[illegible],[illegible]08	918,[illegible]65

VOTE CAST IN OHIO AT PRESIDENTIAL AND STATE ELECTIONS, ETC.—(Continued)

Year of Election	Office	Name of candidate	Politics	Number of votes cast for each candidate	Total
1908	Secretary of State	Samuel A. Hoskins	Democrat	331,073	
		Carmi A. Thompson	Republican	348,777	
		Otis J. Hostetler	Socialist	18,812	
		Alfred F. Hughes	Prohibition	12,310	
		Max Eisenberg	Socialist Labor	2,211	713,183
1909	President	William H. Taft	Republican	572,322	
		William J. Bryan	Democrat	477,709	
		Eugene V. Debs	Socialist	41,937	
		Eugene W. Chafin	Prohibition	21,866	
		Thomas Hisgen	Independence	614	
		Thomas L. Watson	People's Party	1,063	
		August Gillhaus	Socialist Labor	1,111	1,117,621
1909	Governor	Andrew L. Harris	Republican	591,211	
		Judson Harmon	Democrat	497,509	
		Robert Bandlow	Socialist	38,171	
		John D. Martin	Prohibition	19,001	
		Andrew J. Hite	Independence	1,011	
		John Kinder	Socialist Labor	1,101	1,148,103
1909	Secretary of State	Carmi A. Thompson	Republican	590,211	
		J. H. Newman	Democrat	498,211	
		Arthur D. Hollenbaugh	Socialist	41,001	
		Henry C. Haskell	Prohibition	19,011	
		Albert Bagwell	Independence	1,001	
		Timothy Crabtree	People's Party	1,011	
		James Pyle	Socialist Labor	1,011	1,150,456
1910	Governor	Judson Harmon	Democrat	511,211	
		Warren G. Harding	Republican	511,211	
		Frank Clifford	Socialist	28,211	
		Henry A. Thompson	Prohibition	11,211	
		J. B. Mellor	Socialist Labor	2,211	914,211
1910	Secretary of State	Chas. H. Grosvenor	Democrat	511,211	
		Granville W. Mooney	Republican	511,211	
		Edward Hassenauer	Socialist	28,211	
		Alfred H. Shatton	Prohibition	11,211	
		William H. Fox	Socialist Labor	2,211	914,211
1911	President	Woodrow Wilson	Democrat	424,211	
		William H. Taft	Republican	348,211	
		Eugene V. Debs	Socialist	28,211	
		Eugene W. Chafin	Prohibition	11,211	
		Arthur E. Reimer	Socialist Labor	2,211	
		Theodore Roosevelt	Progressive	214,211	1,028,211
1911	Governor	James M. Cox	Democrat	511,211	
		Robert B. Brown	Republican	511,211	
		A. E. Rothgeb	Socialist	28,211	
		Daniel A. Poling	Prohibition	11,211	
		John Kinder	Socialist Labor	2,211	
		Arthur E. Reimer	Progressive	214,211	1,028,211
1911	Secretary of State	Chas. H. Grosvenor	Democrat	511,211	
		Thomas J. Duffy	Republican	511,211	
		C. C. Crist	Socialist	28,211	
		A. Dobson	Prohibition	11,211	
		William H. Fox	Socialist Labor	2,211	
		John E. Gilbert	Progressive	214,211	1,028,211
1912	Governor	James M. Cox	Democrat	511,211	
		Frank B. Willis	Republican	511,211	
		James R. Maurer	Socialist	28,211	
		[illegible]	[illegible]	[illegible]	
1912	Secretary of State	J. H. Goeller	Democrat	511,211	
		Carl C. Crist	Republican	511,211	
		[illegible]	[illegible]	[illegible]	
		[illegible]	[illegible]	[illegible]	
1912	President	Charles E. Hughes	Republican	511,211	
		Woodrow Wilson	Democrat	511,211	
		Allen L. Benson	Socialist	28,211	
		[illegible]	[illegible]	[illegible]	

VOTE CAST IN OHIO AT PRESIDENTIAL AND STATE ELECTIONS.
ETC.—(Continued.)

Year of Election	Office	Name of Candidate	Politics	Number of votes each received	Total
1910	Governor	Frank B. Willis	Republican	161,697	
		James M. Cox	Democrat	168,778	
		Tom Clifford	Socialist	42,909	
		John H. Dickason	Prohibition	7,181	1,176,075
1910	Secretary of State	Carl G. Hildebrant	Republican	395,911	
		William D. Fulton	Democrat	644,100	
		W. T. Bragg	Socialist	98,176	
		Sylvanus E. Fox	Prohibition	6,811	1,145,998
1910	Governor	James M. Cox	Democrat	690,901	
		Frank B. Willis	Republican	676,451	900,861
1910	Secretary of State	William D. Fulton	Democrat	611,644	
		Harvey C. Smith	Republican	611,234	988,878
1920	President	James M. Cox	Democrat	1,000,011	
		Warren G. Harding	Republican	1,181,011	
		Eugene V. Debs	Socialist	61,181	
		P. S. Reynolds	Single Tax	1,181	2,021,111
1912	Governor	A. V. Donahey	Democrat	618,011	
		Harry L. Davis	Republican	1,019,011	
		Frank D. Hamilton	Socialist	61,981	
		Carl D. Fowler	Single Tax	1,811	2,111,111
1912	Secretary of State	William D. Fulton	Democrat	181,111	
		Harvey C. Smith	Republican	1,118,111	
		Louise Marbury	Socialist	61,811	
		Joseph Brennan	Single Tax	1,111	1,111,111
1912	Governor	Lewis A. Thompson	Republican	881,111	
		A. V. Donahey	Democrat	811,111	
		C. Hoosting		111	1,111,111
1912	Secretary of State	Charles H. Brown	Republican	811,111	
		William D. Fulton	Democrat	881,111	1,111,111
1912	President	John A. Davis	Democrat	811,111	
		Calvin Coolidge	Republican	1,111,111	
		Robert M. LaFollette	Progressive	111,111	
		W. J. Wallace	Socialist Labor	1,111	
		Frank T. Johns	Prohibition	1,111	2,111,111
1914	Governor	A. V. Donahey	Democrat	1,111,111	
		Harry L. Davis	Republican	811,111	
		Frank D. Allen	Socialist	61,111	
		Ignatius J. Costin	Socialist Labor	1,111	1,111,111
1914	Secretary of State	J. H. Hopkins	Democrat	811,111	
		Clark H. Brown	Republican	1,111,111	
		Arthur Prosser	Socialist	61,111	
		Morris Pearl	Socialist Labor	1,111	1,111,111
1916	Governor	A. V. Donahey	Democrat	1,111,111	
		Harry L. Davis	Republican	1,111,111	
		Joseph E. Smith	Socialist	61,111	
		Frank J. Sedlak	Socialist Labor	1,111	2,111,111
1916	Secretary of State	Clarence J. Brown	Republican	1,111,111	
		Charles H. Graves	Democrat	1,111,111	
		Harry Schneider	Socialist	61,111	
		W. H. Brown	Socialist Labor	1,111	2,111,111
1916	President	Charles E. Hughes	Republican	1,111,111	
		Woodrow Wilson	Democrat	1,111,111	
		A. L. Benson	Socialist	61,111	
		Frank J. Hanly	Prohibition	1,111	
		J. Frank Hanly	Prohibition	1,111	2,111,111
1918	Governor	Harry L. Davis	Republican	1,111,111	
		James M. Cox	Democrat	1,111,111	
		Joseph E. Smith	Socialist	61,111	
		Frank J. Sedlak	Socialist Labor	1,111	2,111,111

APPENDIX 3.

(Letterhead of)
SECRETARY OF STATE
OHIO

March 17, 1969

Mr. Benjamin B. Sheerer
Rudd, Ober and Miller
Public Square Building
33 Public Square
Cleveland, Ohio 44113

Dear Mr. Sheerer:

We are glad to enclose the results for United States Congressmen cast at the General Election of 1968. You will note that there are some write-in votes in some of the districts, but no *Independents.*

We are sorry to advise that our supply of the printed and bound copies of the 1965-66 Ohio Election Statistics is very nearly depleted. The very best that we can do in this instance is a few copies which are being mailed, under separate cover. The 1967-68 issue is presently in the hands of the printer; however, I am afraid that it will be several months before copies are available for distribution. Your name has been placed on file to receive a supply at such later date. Unfortunately, we cannot definitely promise 40 copies of the above publication (1967-68 edition) but we will come as close to that number as possible.

Very truly yours,

TED W. BROWN
Secretary of State

- - - Compiled by TED W. BROWN, Secretary of State - - -

DISTRICT VOTE FOR REPRESENTATIVES TO CONGRESS, AND
PLURALITIES - GENERAL ELECTION, NOVEMBER 5, 1968

Districts and Counties — Candidates

FIRST DISTRICT	Democrat Karl F. Heiser	Republican *Robert Taft, Jr.
Hamilton (part)	49,830	102,219
Totals	49,830	102,219
Plurality		52,389

SECOND DISTRICT	Republican *Donald D. Clancy	Democrat Don Driehaus
Hamilton (part)	108,157	52,327
Totals	108,157	52,327
Plurality	55,830	

THIRD DISTRICT	Democrat Paul Tipps	Republican *Charles W. Whalen, Jr.
Montgomery (part)	32,012	114,549
Totals	32,012	114,549
Plurality		82,537

FOURTH DISTRICT	Republican *William M. McCulloch	Corbett Lambert (1)
Allen	30,094	
Auglaize	12,679	
Darke	15,776	10
Hardin	9,581	
Mercer	10,331	
Miami	26,1[illegible]	
Montgomery (part)	3,755	
Preble	9,416	
Shelby	11,668	68
Totals	129,435	78
Plurality		

In Hardin County, one vote was cast for each of the following:
Tom Doud
Fred Ewing
Gene Hanson
Harvey Hunsicker, Sr.
Corby Lambett
Samuel Meyer
Robert Milbaugh
Eric Sheldon
(1)

FIFTH DISTRICT	Democrat Louis Richard Batzler	Republican *Delbert L. Latta
Defiance	4,519	9,000
Fulton	2,490	9,231
Henry	2,122	8,608
Lucas (part)	6,994	6,367
Ottawa	4,155	10,467

Districts and Counties	Candidates	
FIRST DISTRICT	Democrat Karl F. Heiser	Republican *Robert Taft, Jr.
Hamilton (part)	49,830	102,219
Totals	49,830	102,219
Plurality		52,389

SECOND DISTRICT	Republican *Donald D. Clancy	Democrat Don Driehaus
Hamilton (part)	108,157	52,327
Totals	108,157	52,327
Plurality	55,830	

THIRD DISTRICT	Democrat Paul Tipps	Republican *Charles W. Whalen, Jr.
Montgomery (part)	32,012	114,549
Totals	32,012	114,549
Plurality		82,537

FOURTH DISTRICT	Republican *William M. McCulloch	Corbett Lambert (1)	
Allen	30,094		In Hardin County, one vote was cast for each of the following: Tom Dowd Fred Ewing Gene Hanson Harvey Hunsicker, Sr. Corby Lambett Samuel Meyer Robert Milbaugh Eric Sheldon (1)
Auglaize	12,679		
Darke	15,776	10	
Hardin	9,581		
Mercer	10,331		
Miami	26,135		
Montgomery (part)	3,755		
Preble	9,416		
Shelby	11,668	68	
Totals	129,435	78	
Plurality			

FIFTH DISTRICT	Democrat Louis Richard Batzler	Republican *Delbert L. Latta
Defiance	4,519	9,000
Fulton	2,490	9,231
Henry	2,122	8,608
Lucas (part)	6,994	6,367
Ottawa	4,155	10,497
Paulding	2,227	5,103
Putnam	2,529	9,067
Sandusky	6,167	15,166
Van Wert	3,212	9,771
Williams	3,356	9,454
Wood	8,113	21,117
Totals	45,884	113,381
Plurality		67,497

DISTRICT VOTE FOR REPRESENTATIVES TO CONGRESS - GENERAL ELECTION - NOVEMBER 5, 1968

Districts and Counties	Candidates	
SIXTH DISTRICT	Republican * William H. Harsha	Democrat Kenneth L. Kirby
Adams	5,116	2,267
Brown	6,599	3,047
Clermont	22,044	8,033
Fayette	7,482	2,139
Hamilton (part)	2,842	887
Highland	9,230	2,618
Lawrence	11,023	7,451
Pike	4,536	3,091
Ross	15,542	3,723
Scioto	23,375	7,708
Totals	107,289	40,964
Plurality	66,325	

SEVENTH DISTRICT	Republican *Clarence J. Brown, Jr.	Democrat Robert E. Cecile
Champaign	8,628	3,570
Clark	30,203	18,529
Greene	23,196	13,909
Logan	10,388	3,955
Marion	14,280	9,385
Montgomery (part)	3,425	3,315
Union	7,461	2,223
Totals	97,581	55,386
Plurality	42,195	

EIGHTH DISTRICT	Democrat Marie Baker	Republican *Jackson E. Betts	James M. Chambers, Jr. (1)
Crawford	5,161	14,784	
Erie	8,243	13,686	
Hancock	4,393	18,488	
Huron	4,817	9,459	
Richland (part)	9,971	22,783	1
Seneca	6,184	16,167	
Wyandot	2,129	6,607	
Totals	40,898	101,974	1
Plurality		61,076	

NINTH DISTRICT	Democrat *Thomas Ludlow Ashley	Republican Ben Marsh
Lucas (part)	85,280	63,290
Totals	85,280	63,290
Plurality	21,990	

TENTH DISTRICT	Democrat Harry B. Crewson	Republican *Clarence E. Miller
Athens	6,504	9,266
Fairfield	7,063	20,993
Gallia	1,860	6,539

.....	.....	.....
Fayette	7,482	2,139
Hamilton (part)	2,842	887
Highland	9,230	2,618
Lawrence	11,023	7,451
Pike	4,536	3,091
Ross	15,542	3,723
Scioto	23,375	7,708
Totals	107,289	40,964
Plurality	66,325	

SEVENTH DISTRICT	Republican *Clarence J. Brown, Jr.	Democrat Robert E. Cecile
Champaign	8,628	3,570
Clark	30,203	18,529
Greene	23,196	13,909
Logan	10,388	3,955
Marion	14,280	9,385
Montgomery (part)	3,425	3,315
Union	7,461	2,223
Totals	97,581	55,386
Plurality	42,195	

EIGHTH DISTRICT	Democrat Marie Baker	Republican *Jackson E. Betts	James M. Chambers, Jr. (1)
Crawford	5,161	14,784	
Erie	8,243	13,686	
Hancock	4,393	18,488	
Huron	4,817	9,459	
Richland (part)	9,971	22,783	1
Seneca	6,184	16,167	
Wyandot	2,129	6,607	
Totals	40,898	101,974	1
Plurality		61,076	

NINTH DISTRICT	Democrat *Thomas Ludlow Ashley	Republican Ben Marsh
Lucas (part)	85,280	63,290
Totals	85,280	63,290
Plurality	21,990	

TENTH DISTRICT	Democrat Harry B. Crewson	Republican *Clarence E. Miller
Athens	6,504	9,266
Fairfield	7,063	20,993
Gallia	1,860	6,539
Hocking	3,189	5,199
Jackson	2,652	7,459
Meigs	2,067	5,770
Monroe	2,541	2,965
Morgan	1,203	3,766
Muskingum (part)	8,103	15,634
Noble	1,442	2,991
Perry	3,385	6,827
Vinton	1,395	2,625
Washington	4,282	12,856
Totals	45,686	102,890
Plurality		57,204

DISTRICT VOTE FOR REPRESENTATIVES TO CONGRESS - GENERA ELECTION - NOVEMBER 5, 1968

Districts and Counties — Candidates

ELEVENTH DISTRICT	Republican *J. William Stanton	Democrat Alan D. Wright
Ashtabula	26,202	8,988
Geauga	15,037	3,999
Lake	43,913	13,940
Portage	25,926	9,196
Trumbull (part)	5,245	1,940
Totals	116,323	38,063
Plurality	78,260	

TWELFTH DISTRICT	Republican *Samuel L. Devine	Democrat Herbert J. Pfeifer
Delaware	10,512	4,423
Franklin (part)	90,900	43,790
Morrow	5,252	2,989
Totals	106,664	51,202
Plurality	55,462	

THIRTEENTH DISTRICT	Democrat Adrian F. Betleski	Republican *Charles A. Mosher
Cuyahoga (part)	5,670	11,184
Lorain	31,540	45,669
Medina	7,301	18,323
Summit (part)	15,353	21,982
Totals	59,864	97,158
Plurality		37,294

FOURTEENTH DISTRICT	Republican *William H. Ayres	Lew Cherry (1)	Democrat Oliver Ocasek
Summit (part)	84,561	47	68,889
Totals	84,561	47	68,889
Plurality	15,672		

FIFTEENTH DISTRICT	Richard Stafford (1)	Democrat Russell H. Volkema	Republican *Chalmers P. Wylie
Franklin (part)	454	30,268	82,826
Madison		2,267	7,221
Pickaway	2	3,326	8,452
Totals	456	35,861	98,499
Plurality			62,638

ELEVENTH DISTRICT	Republican *J. William Stanton	Democrat Alan D. Wright
Ashtabula	26,202	8,988
Geauga	15,037	3,999
Lake	43,913	13,940
Portage	25,926	9,196
Trumbull (part)	5,245	1,940
Totals	116,323	38,063
Plurality	78,260	

TWELFTH DISTRICT	Republican *Samuel L. Devine	Democrat Herbert J. Pfeifer
Delaware	10,512	4,423
Franklin (part)	90,900	43,790
Morrow	5,252	2,989
Totals	106,664	51,202
Plurality	55,462	

THIRTEENTH DISTRICT	Democrat Adrian F. Betleski	Republican *Charles A. Mosher
Cuyahoga (part)	5,670	11,184
Lorain	31,540	45,669
Medina	7,301	18,323
Summit (part)	15,353	21,982
Totals	59,864	97,158
Plurality		37,294

FOURTEENTH DISTRICT	Republican *William H. Ayres	Lew Cherry (1)	Democrat Oliver Ocasek
Summit (part)	84,561	47	68,889
Totals	84,561	47	68,889
Plurality	15,672		

FIFTEENTH DISTRICT	Richard Stafford (1)	Democrat Russell H. Volkema	Republican *Chalmers P. Wylie
Franklin (part)	454	30,268	82,826
Madison		2,267	7,221
Pickaway	2	3,326	8,452
Totals	456	35,861	98,499
Plurality			62,638

SIXTEENTH DISTRICT	Robert Blake (1)	Republican *Frank T. Bow	Robert T. Kendall (1)	Democrat Virgil L. Musser
Mahoning (part)		24,507		11,126
Stark (part)	1	76,988	2	57,790
Totals	1	101,495	2	68,916
Plurality		32,579		

DISTRICT VOTE FOR REPRESENTATIVES TO CONGRESS - GENERAL ELECTION - NOVEMBER 5, 1968

Districts and Counties	Candidates		
SEVENTEENTH DISTRICT	Republican *John M. Ashbrook	Democrat Robert W. Levering	(1) Frank J. Lausche
Ashland	10,926	4,060	
Coshocton	7,370	4,398	
Guernsey	8,378	5,329	
Holmes	3,680	1,787	
Knox	9,891	6,364	
Licking	25,114	14,160	
Muskingum (part)	4,872	1,861	
Richland (part)	2,718	1,558	
Stark (part)	2,768	1,811	
Summit (part)	5,793	4,691	
Tuscarawas (part)	1,114	728	
Wayne	17,524	7,380	1
Totals	100,148	54,127	1
Plurality	46,021		

EIGHTEENTH DISTRICT	Democrat *Wayne L. Hays	Republican James F. Sutherland
Belmont	22,294	12,945
Carroll	4,315	4,255
Columbiana	24,161	17,971
Harrison	4,157	3,402
Jefferson	25,639	12,067
Tuscarawas (part)	16,145	13,107
Totals	96,711	63,747
Plurality	32,964	

NINETEENTH DISTRICT	Joseph Donchess (1)	Robert Hagan (1)	Democrat *Michael J. Kirwan	Republican Donald J. Lewis
Mahoning (part)	1	2	58,630	19,553
Trumbull (part)			43,183	24,810
Totals	1	2	101,813	44,363
Plurality			57,450	

TWENTIETH DISTRICT	Democrat *Michael A. Feighan	Republican J. William Petro
Cuyahoga (part)	72,918	27,827
Totals	72,918	27,827
Plurality	45,091	

TWENTY-FIRST DISTRICT	Republican Charles P. Lucas	Democrat *Louis Stokes
Cuyahoga (part)	28,931	85,509
Totals	28,931	85,509
Plurality		

Ashland	10,926	4,060	
Coshocton	7,370	4,398	
Guernsey	8,378	5,329	
Holmes	3,680	1,787	
Knox	9,891	6,364	
Licking	25,114	14,160	
Muskingum (part)	4,872	1,861	
Richland (part)	2,718	1,558	
Stark (part)	2,768	1,811	
Summit (part)	5,793	4,691	
Tuscarawas (part)	1,114	728	
Wayne	17,524	7,380	1
Totals	100,148	54,127	1
Plurality	46,021		

EIGHTEENTH DISTRICT	Democrat *Wayne L. Hays	Republican James F. Sutherland
Belmont	22,294	12,945
Carroll	4,315	4,255
Columbiana	24,161	17,971
Harrison	4,157	3,402
Jefferson	25,639	12,067
Tuscarawas (part)	16,145	13,107
Totals	96,711	63,747
Plurality	32,964	

NINETEENTH DISTRICT	Joseph Donchess (1)	Robert Hagan (1)	Democrat *Michael J. Kirwan	Republican Donald J. Lewis
Mahoning (part)	1	2	58,630	19,553
Trumbull (part)			43,183	24,810
Totals	1	2	101,813	44,363
Plurality			57,450	

TWENTIETH DISTRICT	Democrat *Michael A. Feighan	Republican J. William Petro
Cuyahoga (part)	72,918	27,827
Totals	72,918	27,827
Plurality	45,091	

TWENTY-FIRST DISTRICT	Republican Charles P. Lucas	Democrat *Louis Stokes
Cuyahoga (part)	28,931	85,509
Totals	28,931	85,509
Plurality		56,578

DISTRICT VOTE FOR REPRESENTATIVES TO CONGRESS - GENERAL ELECTION - NOVEMBER 5, 1968

Districts and Counties	Republican Frances P. Bolton	Democrat *Charles A. Vanik
TWENTY-SECOND DISTRICT		
Cuyahoga (part)	84,975	102,656
Totals	84,975	102,656
Plurality		17,681

Districts and Counties	Republican *William E. Minshall	Democrat James V. Stanton
TWENTY-THIRD DISTRICT		
Cuyahoga (part)	106,852	98,825
Totals	106,852	98,825
Plurality	8,027	

Districts and Counties	Daniel Gleason (1)	Republican *Donald E. Lukens	Democrat Lloyd D. Miller
TWENTY-FOURTH DISTRICT			
Butler		47,816	21,936
Clinton	1	7,492	2,823
Hamilton (part)		14,590	5,572
Montgomery (part)	1	16,809	7,791
Warren		18,643	6,278
Totals	1	105,350	44,400
Plurality		60,950	

* Denotes candidate elected.
(1) Write-in candidate.

OFFICIAL DEMOCRATIC PRIMARY BALLOT

CUYAHOGA COUNTY

a. To vote for a candidate place "X" in the rectangular space at the left of the name of such candidate.
b. If you tear, soil, deface or erroneously mark this ballot return it to the precinct election officials and obtain another ballot.

For United States Senator
(Vote for not more than one)

- FRANK J. LAUSCHE
- JOHN J. GILLIGAN

For Chief Justice of the Supreme Court (Full Term Commencing January 1, 1969)
(Vote for not more than one)

- JOHN C. DUFFY

For Judge of the Supreme Court (Full Term Commencing January 1, 1969)
(Vote for not more than one)

For Judge of the Supreme Court (Full Term Commencing January 2, 1969)
(Vote for not more than one)

- MERRILL D. BROTHERS

For Representative to Congress (21st District)
(Vote for not more than one)

- ANDREW E. ZIOLKOWSKI
- ROBERT W. ANNABLE
- JAMES H. BOYD
- MICHAEL J. CROSSER
- FRANK EVANS
- GEORGE L. FORBES
- LEO A. JACKSON
- EDWARD F. KATALINAS
- FRANK J. KNIOLA
- GERALD J. MARTIN
- JACK P. RUSSELL
- LOUIS STOKES
- GEORGE W. WHITE
- GERALDINE WILLIAMS

For Judge of the Court of Appeals (8th District)
(Full Term Commencing January 1, 1969)
(Vote for not more than one)

For Judge of the Court of Appeals (8th District)
(Full Term Commencing January 2, 1969)
(Vote for not more than one)

- JOSEPH A. ARTL

For Judge of the Court of Appeals (8th District)
(Full Term Commencing January 5, 1969)
(Vote for not more than one)

For Judge of the Court of Appeals (8th District)
(Full Term Commencing February 9, 1969)
(Vote for not more than one)

For Judge of the Court of Appeals (8th District)
(Unexpired Term Ending February 8, 1971)
(Vote for not more than one)

- ROBERT A. DECATUR
- JOHN F. RAY, JR.
- JOHN J. SIBISAN
- JACK G. DAY

For Member of State Central Committee, Man (21st District)
(Vote for not more than one)

- RICHARD L. NORRIS
- LEWIS G. ROBINSON
- LARRY G. SMITH
- JOHN E. BARNES
- LOUIS F. DROZD
- CHARLES L. FLYNN
- THOMAS E. HILL
- LEROY JACKSON

For Member of State Central Committee, Woman (21st District)
(Vote for not more than one)

- LODEAMER THOMPSON
- NAOMI G. WILCOX
- DOROTHY M. ZUPONCIC
- MARY ANN GERACI

For State Representative (41st District)
(Vote for not more than one)

- THOMAS E. HILL

For Judge of the Court of Common Pleas (Full Term Commencing January 1, 1969)
(Vote for not more than one)

- JOHN T. PATTON

For Judge of the Court of Common Pleas (Full Term Commencing January 2, 1969)
(Vote for not more than one)

- RALPH S. LOCHER

For Judge of the Court of Common Pleas (Full Term Commencing January 3, 1969)
(Vote for not more than one)

- NELSON G. KARL
- M. EUGENE FARLEY

For Judge of the Court of Common Pleas (Full Term Commencing January 4, 1969)
(Vote for not more than one)

- GERALD J. CELEBREZZE

For Judge of the Court of Common Pleas (Full Term Commencing January 5, 1969)
(Vote for not more than one)

- FRANCIS J. TALTY

For Judge of the Court of Common Pleas (Full Term Commencing January 6, 1969)
(Vote for not more than one)

For Judge of the Court of Common Pleas (Full Term Commencing January 7, 1969)
(Vote for not more than one)

- JOHN V. CORRIGAN

For Judge of the Court of Common Pleas (Full Term Commencing January 8, 1969)
(Vote for not more than one)

For Judge of the Court of Common Pleas (Full Term Commencing January 9, 1969)
(Vote for not more than one)

- DAVID I. SINDELL
- LEO M. SPELLACY
- RICHARD M. HARMODY

For Judge of the Court of Common Pleas (Full Term Commencing January 10, 1969)
(Vote for not more than one)

- CHARLES B. LAURIE
- EDWARD CORRIGAN

For Judge of the Court of Common Pleas (Full Term Commencing January 11, 1969)
(Vote for not more than one)

- REUBEN M. PAYNE
- EUGENE J. SAWICKI
- DON DeROCCO
- SAMUEL T. GAINES
- WM. T. McKNIGHT

For Judge of the Court of Common Pleas (Full Term Commencing January 12, 1969)
(Vote for not more than one)

- ROBERT H. HANNA
- ARTHUR P. LAMBROS
- FRANK J. GORMAN

For Judge of the Court of Common Pleas (Unexpired Term Ending February 8, 1973)
(Vote for not more than one)

- SAM H. GRIFF
- FRANK V. OPASKAR
- GEORGE P. ALLEN
- JOHN E. CARLIN
- BERNARD B. EASTON

For County Commissioner
(Vote for not more than two)

- RICHARD M. ZWOLENIK
- WILLIAM P. DAY
- DONALD A. OLESKI
- ANTHONY PECYK
- FRANK R. POKORNY
- WILLIAM T. WHITE
- MICHAEL ZONE

For Prosecuting Attorney
(Vote for not more than one)

- JOHN T. CORRIGAN

For Clerk of Court of Common Pleas
(Vote for not more than one)

- EMIL J. MASGAY

For Sheriff
(Vote for not more than one)

- BENJAMIN L. HAYES
- JAMES J. McGETTRICK
- JOSEPH P. MULL
- JOHN E. GALLAGHER

For County Recorder
(Vote for not more than one)

- MARK McELROY

For County Treasurer
(Vote for not more than one)

- FRANK M. BRENNAN

For County Engineer
(Vote for not more than one)

- ALBERT S. PORTER

For Coroner
(Vote for not more than one)

- SAMUEL R. GERBER

For Member of County Central Committee
(Vote for not more than one)

APPENDIX 5.

Ohio Statutes.

89 Ohio Laws 434 (1892), Section 7:

Nominations of candidates for any county, city, township or municipal office, or members of the board of education may be made by nomination papers, signed in the aggregate for each candidate by not less than three hundred qualified electors of the county, or fifty qualified electors of the city, or twenty-five electors of the township, village or school district, respectively; except in counties containing cities of the first and second grade of the first class, such nomination papers shall be signed by petitioners not less in number than one for every fifty persons who voted at the next preceding general election in such county. Nominations of candidates for other offices may be made by nomination papers, signed for each candidate by qualified electors of the state or the district or division for which such candidates are nominated, not less in number than one for every one hundred persons who voted at the next preceding general election in the state or such district or division. * * *

* * * * * *

Section 4785-91, Ohio General Code:

Nominations of candidates for offices, in addition to the nominations made at party primaries, may be made by petitions signed for each candidate by qualified electors of the state or the district or county for which such candidates are nominated, not less in number than one per cent of the qualified electors voting at the next preceding general election for the office of governor in any such county, district, municipality or in the state.

* * * * *

Section 4785-91, Ohio General Code, as amended January 1, 1952:

In addition to nominations of candidates of political parties for election to offices to be voted for at the next following general election, independent candidates for election to offices to be voted at such general election, excepting candidates for presidential electors, may be nominated by nominating petitions. * * *

* * *

Each nominating petition herein provided for, except nominating petitions for candidates provided for in section 4785-90 of the General Code, shall be signed by qualified electors of the state, district, county or municipality in which the candidate designated therein would be a candidate for election as an officer thereof, not less in number than seven per cent of the number of electors who voted for governor at the next preceding general election for the office of governor in the state or in the respective district, county or municipality;

* * * * *

Section 3513.257, Ohio Revised Code:

The nominating petition of an independent candidate for the office of representative to the general assembly, senator of the general assembly, and district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district. * * *

* * * * *

Section 3513.258, Ohio Revised Code:

The nominating petition of an independent candidate for the office of governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, attorney gen

eral, judge of the supreme court, United States senator, and representative at large to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding state election.
* * *

* * * * *

Section 3513.05, Ohio Revised Code:

Each person desiring to become a candidate for a party nomination or for election to an office or position to be voted for at a primary election shall, not later than four p.m. of the ninetieth day before the day of such primary election, file a declaration of candidacy and petition and pay the fee required by section 3513.10 of the Revised Code. Such declaration of candidacy, petition, and all part-petitions shall be filed at the same time as one instrument.
* * *

If the declaration of candidacy declares a candidacy which is to be submitted to electors throughout the entire state, the petition shall be signed by at least one thousand qualified electors who are members of the same political party as the political party of which the candidate is a member, from at least one third of the counties of the state, and such declaration of candidacy and petition shall be filed with the secretary of state; provided that the secretary of state shall not accept or file any such petition appearing on its face to contain the signatures of more than five thousand electors.

* * *

If the declaration of candidacy declares a candidacy which is to be submitted only to electors within a county or a congressional district smaller than a county, the petition shall be signed by at least one hundred qualified electors of such county or district who are members of the same political party as the political party of which the

candidate is a member, or by such electors equal in number to at least five per cent of the number of votes cast for the candidate for governor of the same political party in such county or district at the next preceding regular state election if such five per cent is less than one hundred, and such declaration of candidacy and petition shall be filed with the board of the county; provided that such board shall not accept or file any such petition appearing on its face to contain the signatures of more than five hundred electors.

* * * * *

Section 3517.01, Ohio Revised Code:

A political party within the meaning of Title XXXV of the Revised Code is any group of voters which, at the last preceding regular state election, polled for its candidate for governor in the state at least ten per cent of the entire vote cast for governor or which filed with the secretary of state at least ninety days before an election a petition signed by qualified electors equal in number to at least fifteen per cent of the total vote for governor at the last preceding election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the next succeeding election. Such petition shall be circulated, signed, verified, and the signatures thereon examined and certified to in the same manner as is required of referendum petitions. No such group of electors shall assume a name or designation which is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. When any political party fails to cast ten percent of the total vote cast at an election for the office of governor it shall cease to be a political party.

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

Office-Supreme Court, U.S.
FILED
JUN 6 1969
JOHN F. DAVIS, CLERK

OCTOBER TERM, [redacted] 1969

No. [redacted] 31

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

BRIEF OF APPELLEES JOSEPH A. CIPOLLONE, DIRECTOR, JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES, SAUL G. STILLMAN, MEMBERS OF THE CUYAHOGA COUNTY BOARD OF ELECTIONS.

JOHN T. CORRIGAN,
Prosecuting Attorney of
Cuyahoga County, Ohio,
Criminal Courts Building,
1560 East 21st Street,
Cleveland, Ohio 44114,
Counsel for Appellees,
Joseph A. Cipollone, Director
John J. Carney, Dan W. Duffy,
Robert Hughes, Saul G. Stillman,
Members of the Cuyahoga County
Board of Elections.

JOHN L. DOWLING,
Assistant Prosecuting Attorney,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Questions Presented for Review 1

Statement of the Case 2

Argument 3

I(A). The Seven Percent Statute in Issue Here Section 3513.257 of the Ohio Revised Code, Has Not Been Held Unconstitutional or Void by This Court in *Williams v. Rhodes*, 393 U.S. 23 (1968) 3

I(B). There Is No Evidence That the Seven Percent Statute Abridges Any Fundamental Rights Which Are Protected Against Abridgment by the States by the First and Fourteenth Amendments 3

II. This Court Should Not, on an Appeal, Constitute Itself as a Trial Court to Entertain and Consider Matters Which Were Not in Evidence in the State Trial Court and Are Here Presented Solely by Way of the Appellant's Brief 10

III. The Instant Case Is Moot in View of the Fact That the Election at Which the Appellant Desired to Be a Candidate Has Long Since Passed, the Fact That the Appellant Was Guilty of Delay in Filing This Case, and the Fact That the Appellant Chose Not to File in the Highest State Court Despite the Fact That the Supreme Court of Ohio Had Original Jurisdiction in an Action of This Kind 12

TABLE OF AUTHORITIES.

Cases.

Coffelt v. Bryant, 381 S.W. 2d 731 (1964) 6

Dancy v. Hunt, 294 S.W. 2d (1956) 8

Klein v. Heffernan, 70 N.E. 2d 531, 296 N.Y. 699 5

McDonald v. Board of Elections, Commissioners of Chicago, 89 S. Ct. 1404 (1969) 9

McGowan v. State of Maryland, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 9

Moskowitz v. Board of Elections in City of New York, 274 N.Y.S. 2d 93 (1966) 5

Orsini v. Heffernan, 70 N.E. 2d 531, 296 N.Y. 698 5

People, ex rel. Hotchkiss v. Smith, 206 N.Y. 231, 99 N.E. 568 (1912) 4

State ex rel. Meek v. Board of Deputy State Supervisors, 111 Ohio St. 203 (1924) 11

Williams v. Rhodes, 89 S. Ct. 5, 21 L. ed. 2d 24 (October 15, 1968) 3, 13

Young v. Heffernan, 65 N.Y.S. 2d 423, 187 Misc. 604, affirmed 70 N.E. 2d 411, 296 N.Y. 697 5, 6

Texts.

3 *Am. Jur. Appeal and Error*, Sec. 835, p. 377 10

21 *Ohio Jur. 2d*, Evidence, 23, p. 42 11

21 *Ohio Jur. 2d*, Evidence, Sec. 56, p. 70 11

Ohio Constitution and Statutes.

Ohio Constitution, Art. IV, Sec. 2 12

Ohio Revised Code

Sec. 3513.04 7

Sec. 3513.257 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 921.

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,

Appellees.

BRIEF OF APPELLEES JOSEPH A. CIPOLLONE, DIRECTOR, JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES, SAUL G. STILLMAN, MEMBERS OF THE CUYAHOGA COUNTY BOARD OF ELECTIONS.

QUESTIONS PRESENTED FOR REVIEW.

The appellees, members of the Board of Elections of Cuyahoga County, Ohio, and the Director of Elections of Cuyahoga County, Ohio hereby state, in accordance with Rule 40 (3) of the Rules of the Supreme Court of the United States, that they accept Question No. 1, but that they disagree with the statement contained in the appellant's brief as to the other questions presented for review. It is contended that the only other questions before the Court in the posture in which this case has been presented are as follows:

2. Will this Court constitute itself as a court of first instance, a trial court, to entertain and consider matters which are presented to it solely by way of the appellant's brief and which were not in evidence in the state trial Court?

3. Is not the instant case moot in view of the fact that the election at which the appellant desired to be a candidate has long since passed, the fact that the appellant was guilty of delay in filing the case, and the fact that the appellant chose not to file in the highest state Court, which had jurisdiction, but chose instead, to file the case in the lowest Court of general trial jurisdiction and to allow the case to be long delayed in its ultimate presentation to this Court?

STATEMENT OF THE CASE.

The Board of Elections and the Director of Elections have no objection to the recital contained in Part I of the appellant's Statement of the Case. However, the "historical context" set forth in Part II is wholly improper for the reason that the factual allegations therein are not in the evidence presented to the Court of Common Pleas.

ARGUMENT.

I(A). THE SEVEN PERCENT STATUTE IN ISSUE HERE, SECTION 3513.257 OF THE OHIO REVISED CODE, HAS NOT BEEN HELD UNCONSTITUTIONAL OR VOID BY THIS COURT IN WILLIAMS v. RHODES, 393 U.S. 23 (1968).

The Socialist Labor Party case, *Williams v. Rhodes*, 89 S. Ct. 5, 21 L. ed. 2d 24 (October 15, 1968), *did not* hold that Ohio election laws setting requirements for independents are unduly restrictive and are unconstitutional and did not render the seven per cent requirement void.

This Court did not even have before it the question of the constitutionality of R. C. 3513.257. Anything that appears in the opinions in that case on the subject of independent candidates is obiter dictum. It is highly significant that Brockington fails to call to the attention of this Court anything in the Journal Entry or order of the United States District Court in the Socialist Labor Party case making any order in regard to independent candidates, other than to provide a space for write-in votes.

I(B). THERE IS NO EVIDENCE THAT THE SEVEN PERCENT STATUTE ABRIDGES ANY FUNDAMENTAL RIGHTS WHICH ARE PROTECTED AGAINST ABRIDGMENT BY THE STATES BY THE FIRST AND FOURTEENTH AMENDMENTS.

Brockington has failed to present *evidence* to show that R. C. 3513.257 is unnecessary or unreasonable, and has failed to cite any authority requiring a holding that the statute is unconstitutional.

Throughout this case, Brockington has adopted the approach of attempting to cast the burden of proof upon the respondents-appellees (appellant's brief, pp. 19-20). No authority is cited for transferring the burden of proof

Brockington offered nothing in the way of proof in the trial court in an effort to show that the enactment of R. C. 3513.257 was unnecessary or unreasonable. Some statistics were argued by means of injection into the Brockington trial brief. Not only was there no duty on the part of the trial court to take judicial notice of the statistics, but the record fails to disclose that judicial notice was actually accorded. This could have been cleared up by findings of fact and conclusions of law, but Brockington did not seek same.

Counsel for Brockington admitted in oral argument in the trial court that no Federal Court has made a decision declaring a statute unconstitutional in any situation closely resembling the factual matters before this Court.

Counsel for Brockington, being challenged in oral argument in the trial court to name even one case in which a State Court had declared a similar statute unconstitutional, attempted to revert solely to the case of *People, ex rel. Hatchkiss v. Smith*, 206 N.Y. 231, 99 N.E. 568 (1912), cited at page 24 of the Brockington brief. There is not the faintest resemblance between the statute which the court struck down in that case and the statute which is now up for consideration before this Court, namely Ohio Revised Code Section 3513.257. The actual rationale of the court becomes apparent upon a full reading of the *Hotchkiss* case and it is no authority in the present case. The *Hotchkiss* court at page 572 of the N.E. Report said:

> "In the county of Putnam the average total vote at general elections is a little over 3,000. In Schuyler and Yates counties it is less than 4,000 in each county, while in Hamilton county the average vote is about 1,200 or at least less than 1,500.
>
> "A statutory provision requiring the signatures of 1,500 or even 1,000 voters to entitle a person to file a

> certificate for independent nominations is, in view of the total number of voters in some of the counties of the state, manifestly unreasonable as a matter of law, and the unconstitutionality of the requirement is so clear that it does not make necessary any discussion of that question by us."

It is beyond comprehension how Brockington can derive any comfort from the unconstitutionality of a statute which imposed a flat burden of an absolute minimum number of signatures without regard to the number of voters in any particular district. This bears no similarity whatsoever to the Ohio statute, which clearly recognizes the breadth of the base of the electors in any given area by simply imposing a percentage requirement. Thus, in any circumstances in which a would-be independent candidate is required to obtain a greater number of signatures it is simply and only because he has a greater number of electors from whom to choose and, as the court observed in *Moskowitz v. Board of Elections in City of New York*, 274 N.Y.S. 2d 93 (1966), at page 98:

> "* * * The legislature obviously considered that signers of a petition for the nomination of a regular party candidate must be enrolled in the party, whereas signers of an independent nominating petition may be voters who are enrolled in any party and also those who are not enrolled. The charge that the statute is unfair and discriminatory has been considered by the courts of this state and the contention has been rejected."

The Court in *Moskowitz* was referring primarily to three New York cases decided on the same day, October 25, 1946: *Young v. Hefferman*, 65 N.Y.S. 2d 423, 187 Misc. 604, affirmed 70 N.E. 2d 411, 296 N.Y. 697; *Orsini v. Hefferman*, 70 N.E. 2d 531, 296 N.Y. 698, and *Klein v. Hefferman*, 70 N.E. 2d 531, 296 N.Y. 699.

In the case of *Young v. Heffernan* in which the court rendered an opinion which was followed in the *Orsini* and *Klein* cases, the Court of Appeals of New York upheld a statute which required an independent to obtain 7% of the signatures of the electors with a maximum of 3,000 signatures in a congressional district. At page 607 of the *Young* decision, the court indicated that any question of parity between an independent group and a political party is *for the legislature and not for the court to determine.*

At this point it should be observed that, so far as counsel for the Board of Elections has been able to determine, no court, Federal or State, has struck down as unconstitutional a statute requiring an independent to obtain the signatures of 7% of the electors of his area or district.

During oral argument in the trial court, counsel for the Board of Elections cited the case of *Coffelt v. Bryant*, 381 S.W. 2d 731 (decided September 14, 1964) in which the Supreme Court of Arkansas upheld a statute which required an independent candidate to file nominating petitions with 15% of the total votes cast for Governor. On the subject of a lesser requirement for a party candidate, the court in *Coffelt v. Bryant* stated very cogently its views as to why an independent candidate may, within the proper and legitimate exercise of discretion by the legislature, be required to furnish considerably more signatures. At page 35, the court said:

> "This may well have been the reasoning of the General Assembly: The regular candidates who run for office are required to pay extensive filing fees which are used by the party to defray the expense of holding Primary Elections. In many cases these candidates are faced with strong opponents, and they are required to carry on a time-consuming and expensive campaign. After they have won the election and have become the successful nominees they should not be

faced with Independent Candidates who have paid only a $37.50 filing fee and secured a petition with not less than 50 names signed by qualified electors, unless these Independent Candidates can show a public demonstration and demand for their election. If this condition should exist, it would not be too difficult for the Independent Candidate, where there is no vacancy, to secure a petition signed by not less than 15 per cent of the qualified electors at the last election. To permit an Independent Candidate to run for office where there is no vacancy without securing a petition signed by 15 per cent of the qualified electors would be unfair and unjust to the regular candidate who had been nominated for office. In addition to being unfair and unjust it could easily be argued that this would amount to a discrimination against the regular nominee."

It is the statutory philosophy of Ohio that a person should not be allowed to alternate indiscriminately between party affiliation and political independence, being an independent candidate. This philosophy is expressed in the second paragraph of Section 3513.04 of the Revised Code, as follows:

"No person who seeks party nomination for an office or position at a primary election by declaration of candidacy shall be permitted to become a candidate at the following general election for any office by nominating petition or by write-in."

It is true that there is not a specific legal prohibition against an individual who votes in a party primary to prevent him from being an independent candidate in the next following general election. However, when one seeks to have a court grant the high prerogative writ of mandamus, it is not fitting that the seeker thereof be one who blows hot and cold politically and who, it may be said, is neither fish nor fowl when it comes to adhering to the nature of

his political persuasion. Brockington admitted in his testimony in the trial court that, while seeking office as an independent, he voted in the Democratic primary in May, 1968 (A. 22, R. 21).

The Texas case of *Dancy v. Hunt*, 294 S.W. 2d (1956), in the Court of Civil Appeals of Texas dealt with this problem. In that case the independent candidate complied with the statute requiring her to have the signatures of 5% of the electors in the precinct for County Commissioner. The independent candidate had voted in the party primary. The party nominee brought a mandamus action and argued that the independent had a duty to support the nominee of the party in whose primary she had voted. The court refused the writ of mandamus in that case but indicated that had the county judge refused to place the independent candidate on the ballot, such an independent, if she sought a writ of mandamus, would not be coming into court with clean hands. The court noted that although there is no legal obligation, there is a moral obligation for a voter in a primary election to support the nominee of that primary.

On the subject of the statute's claimed violation of the First Amendment, counsel for the Board of Elections believes that the constitutional provisions for majority rule and for the best exercise of the democratic process in this nation envision the principle that a candidate for any office is in fact seeking to be *elected* to that office. If that principle is accepted, the strong trend of philosophy running through the reported cases in this area shows that a candidate for public office should be required to show some marked demonstration of public support, inasmuch as a candidate can win only with a majority, in cases where there are two candidates, or a plurality, in which there are three or more. It is not unreasonable for an independent

candidate to show that he has the support of 7% or more of his fellow citizens in the area in which he seeks office. If a candidate and his friends and supporters are unwilling, or unable to obtain the signatures of such a small fraction of the electorate (having full lance at Democratic, Republican, and nondeclared voters) his prospects for election would be minuscule, and he can only be characterized as a spoiler. Viewed as an exercise in the expression of dissent or as an opportunity for manifestation of *free speech*, a candidate does not logically complain in this regard because every actual or potential voter who is approached for the purpose of obtaining his signature on a nominating petition becomes a sounding board for the expression of the would-be candidate's political philosophy.

On the subject of the statute's claimed violation of the Fourteenth Amendment as to equal protection, Brockington's argument fails when the evidence in this case is measured in the light of the standard of equal protection:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. State of Maryland*, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1104, 6 L. Ed. 2d 393.

and in the light of the restatement of the standard by Chief Justice Warren in *McDonald v. Board of Elections, Commissioners of Chicago*, 89 S. Ct. 1404 (1969), at page 1408:

> "Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently,

> and the presumption of statutory validity that adheres thereto, admits of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."

It may be seen that Brockington's constitutional argument is wholly without merit.

II. THIS COURT SHOULD NOT, ON AN APPEAL, CONSTITUTE ITSELF AS A TRIAL COURT TO ENTERTAIN AND CONSIDER MATTERS WHICH WERE NOT IN EVIDENCE IN THE STATE TRIAL COURT AND ARE HERE PRESENTED SOLELY BY WAY OF THE APPELLANT'S BRIEF.

A cursory perusal of the Appendix filed in this case, together with an examination of the appellant's brief, immediately reveals that the appellant is seeking to have this appellate court act as a trial court by receiving voluminous documents, none of which was offered in evidence in the Court of Common Pleas.

It seems almost too elementary to point out the impropriety of presenting evidence on appeal. The principle is set forth in 3 *Am. Jur. Appeal and Error*, Sec. 835, p. 377:

> "It is a well-settled rule that, except as otherwise provided by law, new evidence cannot be considered on appeal; the appeal must be decided solely on the evidence produced in the court below and shown by the record."

It may be observed that the appellant Brockington is improperly seeking to have the court take judicial notice of Ohio Election Statistics, a matter which was not introduced by testimony or stipulation and thus was not in the evidence submitted to the trial court *during the trial* of this action. It is not enough for Brockington to have injected statistics into his legal argument in his trial brief. A volume which was gratuitously filed by the appellant with the Court of Appeals is not a part of the record in the trial court and was not entitled to judicial notice by the Supreme Court of Ohio or by this Court. The rule is set forth in 21 *Ohio Jur.* 2d, Evidence, Sec. 56, p. 70, the last paragraph of which states as follows:

> "A reviewing court is confined to the record and may not know judicially anything not appearing therein, at least as to those matters which the lower court was not *required* to judicially notice." (Emphasis ours.)

Brockington has cited in his brief (p. 8) the case of *State ex rel. Meek v. Board of Deputy State Supervisors*, 111 Ohio St. 203, a 1924 case. It is important to note two aspects of that case. 1) The statement that the Supreme Court of Ohio *may* take judicial notice of the Secretary of State's election statistics (at p. 210) is obiter dictum, and is not carried into the syllabus of that case, 2) that the *Meek* case was an original action in mandamus in the Supreme Court of Ohio and did not come up to that court on appeal.

As to the permissive use of judicial notice by a trial court rather than a court of appeals, the rule is stated in 21 *Ohio Jur.* 2d, Evidence, 23, p. 42, as follows:

> "Discretion of Court.—Among the matters of which the courts will take judicial notice there is one class of which a court is bound to take judicial notice

and another class of which it may, in its discretion, take notice. The courts are bound to take judicial notice of the public statutes and the general laws of the forum and of the statutes of every state, territory, and other jurisdiction of the United States. With respect to all matters of fact, however, the rule as to judicial notice is based upon an essentially different principle. Of such matters the court may, in a proper case, take judicial notice, but it is not generally bound to do so. This discretion of the court to take judicial notice of matters of common or universal knowledge should be exercised with caution."

III. THE INSTANT CASE IS MOOT IN VIEW OF THE FACT THAT THE ELECTION AT WHICH THE APPELLANT DESIRED TO BE A CANDIDATE HAS LONG SINCE PASSED. THE FACT THAT THE APPELLANT WAS GUILTY OF DELAY IN BRINGING THIS CASE AND THE FACT THAT THE APPELLANT CHOSE NOT TO FILE IN THE HIGHEST STATE COURT DESPITE THE FACT THAT THE SUPREME COURT OF OHIO HAD ORIGINAL JURISDICTION IN AN ACTION OF THIS KIND.

This matter comes before this Court in the conclusion of a litigation journey which had a genesis after it began in the U. S. District Court for the Northern District of Ohio where Paul M. Brockington and others filed a Complaint concerning the same subject on or about April 28, 1968. Ultimately that Complaint was voluntarily dismissed by the plaintiffs on or about June 27, 1968.

Subsequently, Paul M. Brockington chose not to take advantage of his constitutional right to invoke the original jurisdiction of the Supreme Court of Ohio (Art. IV, Sec. 2 of the Ohio Constitution) to mandamus and filed his petition in the Common Pleas Court of Cuyahoga County on July 10, 1968. Brockington also chose not to file in the U. S. District Court for the Southern District of Ohio

despite the fact that such action was taken by the Socialist Labor Party in its case in which it was represented by the same counsel as Brockington. The Socialist Labor Party enjoyed a direct appeal to this Court, *Williams v. Rhodes*, 89 S. Ct. 5, 21 L. ed. 24; and Brockington could have had a direct appeal to this Court before the election of November 5, 1968. In view of the fact that a constitutional question is alleged and Brockington apparently designed this case for decision ultimately by this Court, his voluntary detour through the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio is inexplicable but weighs heavily against him on the question of moot[ness]. His own want of diligence made the case moot.

Respectfully submitted

John T. Corrigan
Prosecuting Attorney of
Cuyahoga County, Ohio
Counsel for Appellees

Joseph J. Cipollone, Director
John J. Carney, Don W. Duffy
Robert Hughes, Saul G. Stillman,
Members of the Cuyahoga County
Board of Elections

John T. Corrigan
Assistant Prosecuting Attorney
Of Counsel

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 28 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 921, OCTOBER TERM, 1968
Now No. 31, OCTOBER TERM, 1969

PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, et al.,
Appellees.

On Appeal from the Supreme Court of the State of Ohio

SUGGESTION OF MOOTNESS AND BRIEF OF APPELLEES JAMES A. RHODES, TED W. BROWN AND WILLIAM B. SAXBE

PAUL W. BROWN
Attorney General
CHARLES S. LOZEMAN
First Assistant Attorney General
JULIUS J. NEMETH
Assistant Attorney General
State House Annex
Columbus, Ohio 43215
Attorneys for Appellees
JAMES A. RHODES, TED W. BROWN,
and WILLIAM B. SAXBE

MONARCH LAW PRINTERS AND PUBLISHERS, Columbus, Ohio, 44216

TABLE OF CONTENTS

	Page
Suggestion of Mootness	1
Preliminary Statement	2
Question Presented for Review	2
Argument	3
I. *Williams v. Rhodes*, 89 S. Ct. 5 (1968), Did Not Invalidate Section 3513.257, Ohio Revised Code	3
II. *Williams v. Rhodes*, 89 S. Ct. 5 (1968), Set No Standard by Which the Validity of Section 3513.257, Ohio Revised Code, Could Be Judged	4
Conclusion	6

TABLE OF AUTHORITIES

Cases

Williams v. Rhodes, 89 S. Ct. 5 (1968)	3, 4

Statutes

Section 3513.257, Ohio Revised Code	3, 4
Section 3517.01, Ohio Revised Code	3

IN THE

Supreme Court of the United States

No. 921, OCTOBER TERM, 1968
Now No. 31, OCTOBER TERM, 1969

PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, et al.,

Appellees.

On Appeal from the Supreme Court of the State of Ohio

SUGGESTION OF MOOTNESS AND BRIEF OF APPELLEES JAMES A. RHODES, TED W. BROWN AND WILLIAM B. SAXBE

SUGGESTION OF MOOTNESS

By letters dated May 8, 1969 and July 1, 1969, the Attorney General of Ohio requested extensions of time to July 10, 1969, and September 1, 1969, respectively, for the filing of the brief of appellees James A. Rhodes, Ted W. Brown, and William B. Saxbe in the above case. Those requests were based on the fact that legislation to amend certain election laws of Ohio was pending before the Ohio General Assembly. Included among the statutes proposed to be amended was Section 3513.257, Ohio Revised Code, which is reproduced, in the form in which it existed at the inception of this litigation, at pages three and four of the jurisdictional statement filed in the case.

The requirement there contained is that the nominating petition of an independent candidate for the

office of district representative to Congress be signed by not less than seven percent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district, has been the principal point in controversy in this case.

Amended Substitute Senate Bill No. 10 embodied the aforementioned proposed amendments in final form, including a change from seven to four percent in the number of signatures required on the nominating petition of an independent candidate for Congress pursuant to Section 3513.257, Ohio Revised Code. This bill has now been passed by the Legislature and signed by the Governor. The statutory changes are to become effective on October 30, 1969.

Since the statute at the root of the controversy has been substantially changed, it is respectfully suggested that the questions presented by this appeal are moot, and the appeal should be dismissed.

PRELIMINARY STATEMENT

On the matter of facts, Appellees Rhodes, Brown and Saxbe give substantial assent with the portions of Appellants' brief headed "Opinions of the Court Below", "Jurisdiction", "Constitutional and Statutory Provisions Involved", and Part I of the "Statement of the Case". We, therefore, and pursuant to Rule 40(3) of this Court, the Brief of Appellees does not contain corresponding sections. However, Appellees Rhodes, Brown and Saxbe feel that the "Questions Presented for Review" should be expressed.

QUESTION PRESENTED FOR REVIEW

To what extent may a state prohibit certain groups from nominating an independent candidate for Congress to have his name placed upon the ballot for a general election?

ARGUMENT

I

WILLIAMS V. RHODES, 89 S. CT. 5 (1968), DID NOT INVALIDATE SECTION 3513.257, OHIO REVISED CODE.

the well-established principle that a court rules only on those questions which are squarely before it, the constitutionality of Section 3513.257, *supra,* was not adjudicated in the *Williams* case, *supra,* and this statute remained in full force and effect. However, as previously stated, it has now been amended.

II.

WILLIAMS V. *RHODES,* 89 S. CT. 5 (1968), SET NO STANDARD BY WHICH THE VALIDITY OF SECTION 3513.257, OHIO REVISED CODE, COULD BE JUDGED.

The reluctance of the three-judge District Court panel to grant the full relief requested in *Williams* stemmed in large part from its feeling that it had "no guidelines for formulating specific, definite, wholly unprecedented remedies." In all probability, the same feeling was part of the motivation of the courts which passed upon the instant case, and this feeling was not materially altered by the decision of this Court in the *Williams* case, *supra.* This is especially relevant when viewed in light of the fact that this case originated as an action in mandamus, and that, traditionally, a writ of mandamus is not issued unless the petitioner shows a clear legal right thereto. In this regard, the observation of Mr. Chief Justice Warren, at 89 S. Ct. 30, is equally applicable to this case:

"• • • • • • • • •

"*Both the opinion of this Court and that of the District Court leave unresolved what restrictions, if any, a state can impose.* Although both opinions treat the Ohio statutes as a 'package', giving neither Ohio nor the courts any guidance, each contains intimation that a State can by reasonable regulation condition ballot position upon at least three considerations—a substantial showing of voter interest in the candidate seeking a place on the ballot, a requirement that this interest

> be evidenced sometime prior to the election, and a party structure demonstrating some degree of political organization. * * *'' (Emphasis added.)

The first two of the three bases listed above would certainly be applicable to an independent candidate as well, and to the Appellant in the instant case. However, the question of what constitutes a ''reasonable regulation'' was unanswered at the time the State courts passed upon the instant case, and remains so today.

Finally, even though the Supreme Court of Ohio, on October 23, 1968, chose to base its decision in this case on the ground that ''no substantial constitutional question exists herein'' (A. 31), it could have based its decision not to grant the equitable relief sought by Appellant herein equally well on the fact that the granting of such relief, namely the placing of Appellant's name on the ballot in the congressional district from which he sought to be a candidate, would have played a disruptive role in the 1968 election, the same basis upon which this Court denied full relief to the Socialist Labor Party, as indicated at 89 S. Ct. 12.

CONCLUSION

The statute at the root of this controversy has been so changed that the questions presented in this appeal are moot, and the case should be dismissed. However, if the Court determines that the appeal should not be dismissed, the validity of Section 3513.257, *supra,* should be judged on its own merits and, for the reason heretofore stated, the judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

PAUL W. BROWN
Attorney General

CHARLES S. LOPEMAN
First Assistant Attorney General

JULIUS J. NEMETH
Assistant Attorney General
State House Annex
Columbus, Ohio 43215

Attorneys for Appellees
JAMES A. RHODES, TED W. BROWN,
and WILLIAM B. SAXBE

LIBRARY
SUPREME COURT U. S.

FILED
SEP 30 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 31.

PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

REPLY BRIEF OF APPELLANT.

RALPH RUDD,
c/o American Civil Liberties Union of Ohio,
33 Public Square,
Cleveland, Ohio,
Attorney for Appellant.

JERRY GORDON,
BENJAMIN B. SHEERER,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

I. The Question of Mootness 1

II. The Question of Where the Burden of Proof Lies 6

III. The Question of the Protections Due Independent Candidates 7

Conclusion 8

TABLE OF AUTHORITIES.

Cases.

Ashcraft v. Tennessee, 322 U.S. 143 (1944) 3

Bell v. Maryland, 378 U.S. 226 (1964) 3, 4

Kirkpatrick v. Preisler, ____ U.S. ____, 22 L.Ed.2d 519 (1969) 6

Kramer v. Union Free School District, ____ U.S. ____, 23 L.Ed. 583 (1969) 8

Moore v. Ogilvie, ____ U.S. ____, 23 L.Ed.2d 1 (1969) 2, 7

Patterson v. Alabama, 294 U.S. 600 4

Royall, Ex parte, 117 U.S. 241 (1886) 3

State Tax Commission v. Van Cott, 306 U.S. 511 4

Watson v. Memphis, 373 U.S. 526 (1963) 5

Wells v. Rockefeller, ____ U.S. ____, 22 L.Ed.2d 535 (1969) 6

Williams v. Rhodes, 393 U.S. 23 (1968) 5, 6

Statutes.

Ohio Revised Code:

Sec. 3513.05 8

Sec. 3513.257 1

Other.

Beveridge, *The Life of John Marshall*, Vol. II, p. 75 (1916) ---------- 7

1787 The Grand Convention, Clinton Rossiter, The Macmillan Company, New York, 1966 at pp. 312-313 ---------- 7

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 31.

PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO.

REPLY BRIEF OF APPELLANT.

The briefs filed by the appellees fail to deal in any serious way at all with the merits of this case. Instead they continue their tactics of searching for ways to convince the Court to avoid the constitutional issues here. Perhaps no reply is due to these efforts, but appellant wishes to leave no stone unturned in his quest for vindication and therefore offers the following further comments on three questions raised by the appellees.

I. THE QUESTION OF MOOTNESS.

Appellees suggest this case is moot for two reasons:

(1) Since the November 5, 1968, election has been held, this Court is unable to give appellant the specific relief he sought at the time the suit was filed, and

(2) The seven percent requirement for independent candidates contained in Section 3513.257, Ohio Revised Code, is no longer the law in Ohio. The

legislature has reduced the requirement to four percent.

The first of these arguments was anticipated and treated by appellant in his brief-in-chief (see pp. 24-26). Any remaining doubt on the subject should be dispelled by this Court's holding in *Moore v. Ogilvie*, ____ U.S. ____, 23 L.Ed.2d 1, 5 (1969):

> Appellees urged in a motion to dismiss that since the November 5, 1968, election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over the burden * * * allowed to be placed on the nomination of nominees for statewide offices remains and controls future elections * * *. The problem is therefore "capable of repetition, yet evading review * * *." The need for its resolution thus reflects a continuing controversy in the federal-state area where our "one man—one vote" decisions have thrust. We turn then to the merits.

Appellees' other claim of mootness is founded on an irrelevancy. The action taken by the Ohio legislature [1] does not affect the question posed here. *The issue is whether any percentage requirement for independents in excess of one percent abridges their constitutional rights.* In his petition for a writ of mandamus filed with the Court of Common Pleas of Cuyahoga County, appellant asked that his name be placed on the ballot on the basis of having satisfied the former *one percent requirement*. (See paragraph 14 of petition, paragraph 2 of prayer; Appendix, p. 6.) The Court declined to grant the writ. The question posed for review is whether the trial court's action was proper.

---

[1] The legislature acted only after this Court assumed jurisdiction of the subject case.

The towering constitutional question is and has been from the inception of this case whether the one percent standard, viewed in the light of the State's experience under that standard, constitutes a *ceiling* above which the State may not go. It is apparent that if this Court answers that question in the affirmative, any statute requiring a higher percentage, *whether four or seven,* is unconstitutional and void. Thus despite the Legislature's action, the issue remains precisely what it was before and is in no way rendered moot.

Furthermore, this case is not one in which changes in the applicable state law intervening between decision by the highest state court and decision by this Court cast upon this Court the burden of settling state as distinct from federal questions. Cf. *Bell v. Maryland,* 378 U.S. 226 (1964). The only questions raised here are federal questions. The Ohio Supreme Court refused to grant review on the ground that "no substantial constitutional question exists herein." To remand the case to that court now would be an exercise in futility. This is not a matter of "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall,* 117 U.S. 241, 251 (1886). The Ohio Supreme Court has previously declined to render a judgment in this case, at least on the merits, and there is no basis for asking it to do so now. If that Court did not deem the seven percent statute a substantial violation of appellant's constitutional rights, it will not, *a fortiori,* entertain jurisdiction and hear a challenge to a four percent law.

In *Ashcraft v. Tennessee,* 322 U.S. 143, 156 (1944), the Court said:

> In disposing of cases before us it is our responsibility to make such disposition as justice may require. "And in determining what justice does require, the Court

is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *Patterson v. Alabama,* 294 U.S. 600, 607; *State Tax Commission v. Van Cott,* 306 U.S. 511, 515-516.

Justice here requires a disposition now of appellant's claim and a holding that Ohio cannot constitutionally compel independents to secure signatures numbering more than one percent in order to qualify for the ballot. To hold otherwise would mean:

1. The four percent statute would be validated, at least for purposes of the next election.

2. New litigation would have to be filed challenging the four percent provision and, based on previous experience in the state courts, the long climb up the appeal ladder would have to be made once again.

3. The question raised by appellant as to whether he should have been certified for the ballot as a result of having filed valid signatures numbering more than one percent—*but less than four percent*—would remain unanswered.

4. A problem not only "capable of repetition," *Moore v. Ogilvie, supra,* but inevitably recurring would remain unresolved.

5. An "obvious pretense" "to avoid facing the constitutional question," *Bell v. Maryland, supra* at 243, Douglas, J., concurring would be judicially approved and a harmful precedent set. A future challenge to the four percent statute if it reached this Court in another two years, could be obviated again by the simple expedient of the legislature's adopting a 3.5% classification for independents. A restoration of Ohio's one percent law could thus be delayed indefinitely.

6. An onerous and unfair burden would be placed on this appellant who has diligently prosecuted his appeal through four courts.

Experience has amply proven that the Ohio legislature, if left to its own devices, will not accord independent candidates the rights guaranteed them by the United States Constitution. Acting under the compulsion of the holding in *Williams v. Rhodes*, 393 U.S. 23 (1968), the Ohio legislature did enact new legislation supposedly permitting third political parties to qualify for ballot position. But this new legislation is as constitutionally infirm as was the old. A new political party in Ohio must now gather *seven percent* of the total vote cast for governor or approximately 200,000 valid signatures. *This is by far the highest requirement in the nation!*

The failure of the legislature to permit independents and new political parties to qualify on a one percent basis underscores the imperative need for judicial guidelines and the establishment of ceilings. The alternative is endless delay in securing rights for those of an independent persuasion:

> [A]ny deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. (Emphasis by the Court.)
>
> *Watson v. Memphis*, 373 U.S. 526, 532-533 (1963).

There is no "overwhelmingly compelling reason" to perpetuate Ohio's discriminatory and burdensome election laws, even in their amended form. The election process

is too vital a part of our democratic system to permit delay in removing undue obstacles.

This Court is respectfully urged to reject the suggestion of mootness, to decide this case on the merits, and to hold that Ohio may not abrogate the rights of independent political candidates by requiring them to obtain more signatures that were previously required by the one percent statute in order to secure a place on the ballot.

II. THE QUESTION OF WHERE THE BURDEN OF PROOF LIES.

In their brief the appellee members and director of the local Board of Elections again dispute where the burden of proof lies in this case and what material the court may consider in deciding the case.

Appellant, of course, has shown without contradiction that he satisfied the constitutional requirements for the office he sought and that he had secured sufficient signatures to satisfy the former law. In this posture and where a claim is made that the state law violates the Equal Protection Clause:

> [W]e must consider the facts and circumstances of the law, *the interests which the state claims to be protecting*, and the interests of those who are disadvantaged by the classification. (Emphasis added.)
>
> *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

In other election cases the Court has held that:

> [i]t was the burden of the State "to present * * * acceptable reasons for the variations among the populations of the various * * * districts * * *."
>
> *Kirkpatrick v. Preisler*, ____ U.S. ____, 22 L.Ed.2d 519, 526 (1969).

See also: *Wells v. Rockefeller*, ____ U.S. ____, 22 L.Ed.2d 535, 538 (1969).

III. THE QUESTION OF THE PROTECTIONS DUE INDEPENDENT CANDIDATES.

The appellees hint that independent candidates are entitled to less protection than that given to party candidates. There are several answers to these contentions.

First, this Court has recently said that independent candidate procedures are subject to constitutional scrutiny:

> The use of nominating petitions by independents to obtain a place on the Illinois ballot is an integral part of her elective system. * * * All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote.
>
> *Moore v. Ogilvie*, ____ U.S. ____, 23 L.Ed.2d 1, 6 (1969).

Second, it is clear that our constitution is neutral on the existence of political parties. Nothing in it entitles them to special treatment. In point of fact, it seems that the framers did not anticipate the development of political parties. Beveridge says:

> In this rise of political parties the philosophy of the Constitution was negatived; for our fundamental law, unlike those of other modern democracies, was built on the non-party theory and did not contemplate party government. Its architects did not foresee parties. Indeed, for several years after the Constitution was adopted, the term "party" was used as an expression of reproach. The correspondence of the period teems with illustrations of this important fact.
>
> Beveridge, *The Life of John Marshall*, Vol. II, p. 75 (1916).[2]

Third, the fact that party primaries are sometimes rigorous contests is irrelevant as to whether an independ-

---

[2] See also: *1787 The Grand Convention*, Clinton Rossiter, The Macmillan Company, New York, 1966 at pp. 312-313.

ent should be allowed on the ballot. Candidates enter party primaries because the prize of party label and support is worth having in an election. This is what makes the contest—nothing required by the Constitution.

Finally, even if the Court should decide that an independent candidate for political office may be subjected to a higher signature requirement to qualify for the ballot than the party candidate, the question remains: How much higher?

It is clear that in such a situation an "exacting standard" is applied to determine whether the "requirements do in fact sufficiently further a compelling state interest to justify denying" ballot position to appellant and other independent candidates. *Kramer v. Union Free School District*, ____ U.S. ____, 23 L.Ed. 583, 593 (1969).[3] It is certain that this is not the case here. Both the 7% standard and the 4% standard are far in excess of the needs of any valid state interest.

CONCLUSION.

The appellees have once again refused to squarely join the constitutional issues here. They urge the Court to leave political independents in limbo unable to exercise what should be the elemental constitutional right to seek political office.

Respectfully submitted,

RALPH RUDD,
Counsel for Appellant.

BENJAMIN B. SHEERER,
JERRY GORDON,
Of Counsel.

---

[3] From appellant's standpoint the reduction to 4% is scant improvement. In 1968 he would have needed 3414 signatures, a number much in excess of the 899 he did obtain. The candidate in Ohio's 22nd Congressional district would have needed 5874 signatures in 1968. Party candidates qualify with 100 signatures. Section 3513.05, Ohio Revised Code.

BROCKINGTON *v.* RHODES, GOVERNOR OF OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO

No. 31. Argued October 22, 1969—Decided November 24, 1969

Appellant, whose nominating petition bore signatures of about 1% of those in the congressional district who had voted in the last gubernatorial election (although the Ohio statute then required 7% of the voters on the nominating petition for an independent candidate for Congress), sought, as his sole relief, a writ of mandamus to compel the Board of Elections to place his name on the ballot as an independent candidate for Congress in the November 1968 election. *Held:* In view of the limited nature of the relief requested the case is now moot.

Vacated and remanded.

Benjamin B. Sheerer argued the cause for appellant. With him on the briefs was *Ralph Rudd.*

Robert D. Macklin, Assistant Attorney General of Ohio, argued the cause for appellees. On the brief were *Paul W. Brown,* Attorney General, *Charles S. Lopeman,* First Assistant Attorney General, and *Julius J. Nemeth,* Assistant Attorney General. *John T. Corrigan* and *John L. Dowling* filed a brief for appellees Cipollone et al.

PER CURIAM.

The appellant sought to run in the November 1968 election as an independent candidate for the United States House of Representatives from the Twenty-first Congressional District of Ohio. His nominating petition bore the signatures of 899 voters in the congressional district, a little over 1% of those in the district who had voted in the gubernatorial contest at the last election. The Board of Elections ruled that the appellant's petition was insufficient to put his name on the November ballot, because it did not contain the signatures of 7% of the

qualified voters, as Ohio law then required.[1] The appellant petitioned the Court of Common Pleas for a writ of mandamus, challenging the 7% requirement as "unreasonably high and excessive, . . . disproportionate when compared to the 100 signatures required for party candidates,[2] . . . arbitrary and capricious, . . . [and] an invidious discrimination without any relationship to constitutionally justified ends . . . ." He urged as the proper standard for determining the sufficiency of his nominating petition the 1% requirement that had prevailed for over 60 years until the enactment of the 7% rule in 1952. He prayed for an immediate order restraining the Board of Elections from printing the election ballots; also for a writ of mandamus commanding the Board "to certify the sufficiency of relator's nominating petition" and directing the appellees "to do all things necessary to place relator's name upon the ballot as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District in the November 5, 1968, general election . . . . ." His suit did not purport to be a class action, and he sought no declaratory relief.

On August 22, 1968, the Court of Common Pleas denied the writ of mandamus. On October 1 the Court of

---

[1] Ohio Rev. Code Ann. § 3513.257 (Supp. 1968) provided, in pertinent part:

"The nominating petition of an independent candidate for the office of . . . district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district."

[2] Under Ohio law a candidate for the nomination of a political party to the office of United States Representative must, in order to enter the *party primary*, obtain from the party membership within the congressional district the signatures of either 100 voters or 5% of those who voted in the last gubernatorial election, whichever is less. Ohio Rev. Code Ann. § 3513.05 (Supp. 1968).

Appeals for the Eighth Judicial District affirmed that judgment, and on October 23 the Supreme Court of Ohio dismissed the appeal for want of a substantial constitutional question. The appellant then appealed to this Court pursuant to 28 U. S. C. § 1257, and we noted probable jurisdiction, 393 U. S. 1078. While the appeal was pending here, Ohio amended the controlling statute, effective October 30, 1969, reducing the signature requirement from 7% to 4%.

We do not think the recent statutory amendment has rendered this case moot. For the appellant has consistently urged the unconstitutionality of any percentage requirement in excess of the 1% that Ohio imposed prior to 1952, and he obtained the signatures of only about 1% of the voters in his district. He thus could not have won a place on the ballot even under the statute as currently written. Cf. *Hall* v. *Beals*, *post*, p. 45.

Rather, in view of the limited nature of the relief sought, we think the case is moot because the congressional election is over. The appellant did not allege that he intended to run for office in any future election. He did not attempt to maintain a class action on behalf of himself and other putative independent candidates, present or future. He did not sue for himself and others similarly situated as independent *voters*, as he might have under Ohio law. Ohio Rev. Code Ann. § 2307.21 (1953). He did not seek a declaratory judgment, although that avenue too was open to him. Ohio Rev. Code Ann. §§ 2721.01–2721.15 (1953).

Instead, he sought only a writ of mandamus to compel the appellees to place his name on the ballot as a candidate for a particular office in a particular election on November 5, 1968. In Ohio mandamus is an extraordinary remedy, available to a petitioner only on a showing of clear legal right. *State ex rel. Gerspacher* v. *Coffinberry*, 157 Ohio St. 32, 104 N. E. 2d 1; *State ex rel.*

Stanley v. *Cook*, 146 Ohio St. 348, 66 N. E. 2d 207. The writ does not lie to review the determination by a Board of Elections that a candidate is ineligible to assume the office he seeks or that his petition is invalid, in the absence of allegations of fraud, corruption, abuse of discretion, or a clear disregard of statutes or applicable legal principles. *State ex rel. Flynn* v. *Board of Elections*, 164 Ohio St. 193, 129 N. E. 2d 623; cf. *State ex rel. Hanna* v. *Milburn*, 170 Ohio St. 9, 11, 161 N. E. 2d 891, 893. In the instant suit the Court of Common Pleas ruled that the appellant "must not only establish that the act which he seeks to compel respondents to perform is one that they are constitutionally bound to perform by virtue of their offices, but also that he, the relator, has a clear right to have the duty enforced." The court, without passing on the merits of the legal issues raised by the parties, found that the appellant had not established a clear legal right to the writ on the basis of all the evidence.

It is now impossible to grant the appellant the limited, extraordinary relief he sought in the Ohio courts. Accordingly, the judgment of the Supreme Court of Ohio must be vacated, without costs in this Court, and the cause remanded for such proceedings as that court may deem appropriate.

It is so ordered.